Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

—v.—

NEW YORK.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT FILED APRIL 18, 1974
PROBABLE JURISDICTION NOTED OCTOBER 21, 1974

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CRIMINAL TERM OF THE RICHMOND COUNTY SUPREME COURT COUNTY OF RICHMOND

THE PEOPLE OF THE STATE OF NEW YORK

against

CLIFFORD HERRING, DEFENDANT

The Grand Jury of the County of Richmond, by this indictment, accuse CLIFFORD HERRING of the crime of Attempted Robbery 1st Degree (P.L.160.15) committed as follows:

The said CLIFFORD HERRING in the Borough of Richmond, City of New York, County of Richmond and State of New York, on or about the 15th day of September, in the year of our Lord one thousand nine hundred and seventy-one, attempted to forcibly steal property from Allen Braxton, consisting of approximately Eleven ($11.00) Dollars, in good and lawful currency of the United States of America, and in the course of the commission of the crime or of immediate flight therefrom, threatened the immediate use of a dangerous instrument, to wit, a knife.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse said defendant of the crime of ATTEMPTED ROBBERY IN THE THIRD DEGREE, (P.L.160.05) committed as follows:

The said defendant, in the County of Richmond aforesaid, on or about the 15th day of September, 1971, attempted to seal property from Allen Braxton, consisting of approximately Eleven ($11.00) Dollars, in good and lawful currency of the United States of America.

THIRD COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse said defendant of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, (P.L.265.05) as a felony, committed as follows:

The said defendant, in the County of Richmond aforesaid, on or about the 15th day of September, 1971, had in his possession a dangerous instrument, to wit, a knife, with intent to use the same unlawfully against another, against the form of the statute in such case made and provided and against the peace of the People of the State of New York and their dignity.

All of the acts and transactions alleged in the counts of this Indictment are connected together and constitute part of a common scheme or plan.

/s/ Ralph Di Soria
Acting District Attorney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART II

Ind. No. 311/1971

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, New York

February 3, 1972

BEFORE: HONORABLE THEODORE BARLOW
JUSTICE OF THE SUPREME COURT

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
APPEARING FOR THE PEOPLE

BY: ANTHONY I. GIACOBBE, ESQ., ADA,
of Counsel

SEYMOURE ADAMS, ESQ.
APPEARING FOR THE DEFENDANT

S. DAVIDSON
Official Court Reporter

[2] THE CLERK: Case on trial, Indictment Number 311 of 1971, Clifford Herring. Mr. Herring is represented by Seymoure Adams, and People are represented by Mr. Giacobbe. Are both sides ready to proceed?

MR. GIACOBBE: People are ready.

MR. ADAMS: The defendant is ready. Judge. One request, Judge. If there are any other witnesses other

than that one testifying, I respectfully request that he or she be excluded from the Courtroom.

THE COURT: Are there any other witnesses?

MR. GIACOBBE: I have none, and I make the same request of the defendant.

MR. ADAMS: We will abide. Can we approach the Bench for a moment, Judge?

(At this point, a discussion was held off the record.)

MR. GIACOBBE: Your Honor, in this case, the People will prove that on September 15th, 1971, at approximately 6:00 P.M., the complainant in this case, Allen Braxton, was at the rear of his home at 7 Markham Drive in Richmond County, New York. The People will prove that at that time the complainant, Allen Braxton, had in his hand [3] the sum of $11 in United States currency. We will prove that while the complainant was at that location with the money in his hand, he was approached by this defendant, who demanded the money from him and displayed a knife in an attempt to steal the money and rob it from the complainant's person. An exchange of words took place, the complainant left the area, ran from the area into his home, which was at 7 Markham Drive, the defendant left the area without actually getting the money, and the complainant shortly thereafter reported the incident to a police officer. And we will prove further that at approximately 7:30 to 8:00 P.M. that evening, the defendant was placed under arrest in connection with this case.

THE COURT: Defendant wish to make a statement?

MR. ADAMS: Just briefly, Judge. The defendant has informed me that he did not commit this particular crime, that he was not at the location, he was not in the area at the time of the alleged commission of this crime, and that we hope to prove that to the satisfaction of the Court. I have already told Mr. Giacobbe that it will be alleged that the defendant was not at the location when the alleged crime took place.

[4] THE COURT: All right, call your witness.

MR. GIACOBBE: We call Allen Braxton, please.

ALLEN BRAXTON, 7 Markham Drive, Staten Island, New York, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GIACOBBE:

Q What is your occupation?
A I'm a Marine.
Q When were you sworn into the United States Marine Corps?
A Yesterday.
Q Mr. Braxton, on September 15th, 1971, where were you living?
A 7 Markham Drive.
Q On Staten Island?
A Yes.
Q And on September 15th, 1971, at approximately 6:00 P.M., where were you?
A 7 Markham Drive in the back.
Q Were you inside or outside?
A Outside.

MR. ADAMS: Will you ask the witness to please speak louder, Judge.

[5] THE COURT: Speak up so Mr. Adams can hear you.

CONTINUING DIRECT EXAMINATION

BY MR. GIACOBBE:

Q You were outside in the back, is that correct?
A Yes.
Q What were you doing on that day at that time and place?
A Just walking.
Q Where had you been?
A I don't remember exactly where I was coming from.
Q Now, while you were there, what, if anything, did you have in your hand?
A I had money.
Q How much money did you have in your hand?

A $11.
Q What were you doing with the money that you had?
A Putting it in my pocket.
Q As you were doing that, were you alone?
A No.
Q What happened? Who were you with?
A No, I am talking about when—
Q You say—
A Me and someone else.
Q I will rephrase the question. You say you were [6] in the back of 7 Markham Drive, is that correct?
A Yes.
Q You had money in your hand, is that correct?
A Yes.
Q What, if anything, happened at that time and place?
A Well, Clifford Herring had walked up to me and said that he was sick and that he needed some money, and I said no. So he took out a knife and he tried to cut me. So, I had just ran into my house.
MR. ADAMS: Sorry, I didn't hear that, Judge.
THE COURT: Read back the witness' answer.

(The above answer was read back.)

CONTINUING DIRECT EXAMINATION

BY MR. GIACOBBE:

Q When Clifford Herring took out the knife and tried to cut you, will you describe to the Court just what he did with that knife.
A Made a motion. (Indicating.)
Q Indicating a motion of the right hand, the right arm being extended and the right wrist being flicked. Did he say anything to you when he did that?
A Just what I said before.
Q And then you ran into the house after, is that [7] correct?
A Yes.
Q Before September 15th, 1971, had you ever seen Clifford Herring?

A Yes.
Q And when you say Clifford Herring, will you look in this Courtroom and see if the person you are talking about is present now.
A Yes.
Q Will you please point him out. (Indicating the defendant, Clifford Herring.)
Did you know the defendant Clifford Herring before September 15th, 1971?
A Yes.
Q And for how long a period of time did you know him?
A Six months.
Q When you say you know him, will you explain to the Court in what way you knew him, whether you were friends or socialized together or what.
A I just knew about him, I heard about him, people were telling me—
Q Don't tell us what people told you about him. Had you ever seen him?
[8] A Yes.
Q Did you know what his name was?
A Yes.
Q Now, when you ran into the house, what, if anything, did the defendant, Clifford Herring do?
A I don't know, I didn't turn around.
Q What did you do when you went into the house?
A I was looking for the cop that was in my house at the time, it's Patrolman Medis.
Q Do you know a Patrolman Wilfred Stubbs?
A Yeah, I just made a mistake there, I'm sorry.
Q What's that?
A Stubbs is the name I meant.
Q When you say Patrolman Medis, you mean you meant Patrolman Stubbs, is that correct?
A Yes.
Q On September 15th, 1971, before the time that Clifford Herring came up to you around 6:00 P.M., had you seen Patrolman Stubbs?
A Yes.
Q And where had you seen him?

A I seen him in my house.
Q About what time was it when you saw him?
A About 5:30.
[9] Q Do you know how long Patrolman Stubbs had stayed inside your house?
A No.
Q Do you know when he left your house?
A No, I don't.
Q When you went into the house after the defendant Herring flicked a knife at you, was Stubbs in the house then?
A No.
Q Who was in the house when you went in?
A Just my mother.
Q Now, what did you do after you went into the house?
A I asked my mother where did—
MR. ADAMS: Judge, I object to this as not binding upon the defendant what he said to his mother, what he did when he went into the house, Judge.
THE COURT: I will sustain the objection.

CONTINUING DIRECT EXAMINATION

BY MR. GIACOBBE:

Q When you went in the house, did you speak to your mother?
A Yes.
[10] Q After speaking to your mother, did there come a time when you spoke to Patrolman Stubbs that night?
A Yes.
Q And did you talk to Patrolman Stubbs when you saw him?
A Yes.
Q Now, you testified that you saw the defendant Herring at the rear of your house at around 6:00 P.M., is that correct?
A Yes.
Q Did you see the defendant Herring at any other time after that on the night of September 15th, 1971?

A Yes.
Q At approximately what time was that?
A It was before eight o'clock.
Q Do you recall whether it was between—I withdraw that.
Where was the defendant Herring when you saw him then?
A On Broadway and between Castleton and Henderson Avenue.
Q Was anyone with him when you saw him?
A No.
Q Was anyone with you when you saw him?
A Yes.
[11] Q Who was with you?
A Willie Stubbs.
Q When you say Willie Stubbs, are you referring to Patrolman Stubbs?
A Yes.
Q Is he a Housing Authority police officer at that time?
A Yes.
Q Now, when you were with Patrolman Stubbs and you saw the defendant Herring, what did the police officer do?
A He went over and made an arrest.
Q Now, going back to the six o'clock time that you testified about, did the defendant Herring take the money from you that you had in your hand?
A No.
Q Did you keep the money when you ran into the house?
A Yes.
MR. GIACOBBE: Thank you very much, your witness.

CROSS-EXAMINATION

BY MR. ADAMS:

Q 7 Markham Drive, is that part of the Housing
[12] Authority development?

A Yes.
Q And 7 Markham Drive, between what two streets is it?
A Wayne Court and Wayne Terrace.
Q Now, you say you were in your back yard about 7:00 P.M. on—
A Six.
Q 6:00 P.M., I'm sorry. On September 15th, is that correct?
A Yes.
Q You said you had some money in your hands?
A Yes.
Q Now, where had you just come from?
A I was walking from a park that's behind my house.
Q What park?
A The Markham Homes.
Q And you were walking to your house?
A Yes.
Q Did you have the money in your hands at that time?
A Yes.
Q How was that money broken up, the $11?
A $11.
Q How much money did you have?
[13] A $11.
Q How was it broken up?
A Ten and one.
Q Was it silver dollars, bills or what?
A Bills.
Q What kind of bills?
A A ten and a one.
Q And where had you gotten that $11?
A Well, I had a job at the time.
Q Where were you working?
A Alfredo's Smelting Company.
Q What?
A It's a steel company.
Q What time had you finished working that day?
A Five o'clock.
Q From your place of employment where did you go that night after you left?

A I came home.
Q You came home. How long did you stay at home?
A Well, I didn't go into the house.
Q You just went to the house, but you didn't go in, is that correct?
A I went to the area of where I lived at.
Q All right. What part of the area did you go to [14] after you left work?
A Well, I was up on North Burgher.
Q And did you walk—
A Yes.
Q —from your place of employment to North Burgher?
A Yes.
Q From North Burgher where did you go?
A I don't remember right there, but it was in the vicinity of my house.
Q In the vicinity of your house?
A Yes.
Q Did you ever enter into your house from the time that you left your employment at five o'clock until 6:00 P.M. on September 15th?
A Yes.
Q When did you enter your house?
A I would say about 5:30.
Q How long were you in the house?
A About five or ten minutes.
Q I see. And did you eat?
A No.
Q And you said you saw Patrolman Stubbs in the house?
A Yes.
[15] Q Is he a friend of yours?
A Yes.
Q Is he a friend of your mother and father?
A Yes.
Q And, yes or no, did you speak to Officer Stubbs on or about 5:30 P.M. at all?
A I said hi.
Q And then you went out?
A Yes.

Q And where did you go?
A I went out the front and I walked back up to North Burgher to see if a friend of mine—car was there.
Q When you walked out of your house at approximately 5:35 P.M., and you went up the street to see a friend of yours, did you have the money in your hands?
A No.
Q And what were you wearing at that particular time?
A Shirt, dungarees and shoes.
Q Did you have pants on?
A Excuse me.
Q Did you have any slacks on or pants?
A Yes.
Q Those slacks or pants have any pockets?
A Yes.
[16] Q And what did you have in those pockets when you left the house on or about 5:35 P.M.?
A I had a wallet.
Q You had a wallet?
A Yes.
Q Was your wallet in your pockets?
A Yes.
Q Was that $11 in the wallet when you left your house at about 5:35 P.M.?
A No.
Q What day of the week was September 15th?
A I don't recall.
Q What was the weather at 5:35 P.M.?
A It was nice out.
Q Do you know the temperature?
A No, I don't.
Q Approximately?
A No.
Q Warm day or cool day?
A Warm.
Q Were you wearing a hat?
A No, I wasn't.

Q What did you have in that wallet as you left at or about 5:35 P.M. from your house? What did you have [17] in that wallet?
A Nothing.
Q Nothing at all?
A No.
Q It was an empty wallet?
A Yes.
Q Devoid of any papers or anything else, is that correct?
I will withdraw the question.
You didn't have any papers at all in that wallet?
A Yes, I had papers in the wallet.
Q But no money?
A No money.
Q Did you have any silver with you?
A No, I didn't.
Q And you left to see a friend, is that correct?
A Yes.
Q And how far did you walk? Approximately?
A I can't say.
Q What's that, sir?
A I don't remember. I don't know the distance of how far I walked.
Q From 7 Markham Drive where did you go to? What address?
[18] A It wasn't an address, I was just looking out in the street.
Q Just looking up the street?
A Yes.
Q Didn't you walk up the street?
A Yes.
Q You weren't in a car, were you?
A No.
Q And how far did you walk, a block, two, ten or fifteen?
A About a block.
Q And when you walked that block, did you see someone?
A No.
Q You saw no one?

A No.
Q And then you returned?
A Yes.
Q On your way back, did you speak to anyone?
A No, I didn't.
Q And on your way back did you go into the house?
A This was after I had left the house at 5:30, right.
Q 5:35 you said you walked up the street, is that correct?
[19] A Yes.
Q And you went to see someone? You didn't see that party, is that correct?
A Yes.
Q And then you decided to walk back, is that correct?
A Yes.
Q And was the sun out?
A Yes.
Q And did you walk down the same block that you walked up?
A No.
Q Which block did you walk back on?
A The back of my house.
Q Is that a street or is that a back yard?
A It's a street.
Q What is the name of that street?
A Markham Court.
Q And you walked down Markham Court to the rear of your house?
A Yes.
Q And then all of a sudden you said Mr. Herring appeared, is that correct?
A Yes.
[20] Q Now, where did you get the $11?
A From work.
Q From work?
A Yes.
Q But didn't you just tell me that you left the house at or about 5:35 P.M., you had no money with you?
A You said if I had any money in my wallet.
Q Right.

A I had the money in my front pocket.
Q In your front pocket. You didn't have it in you wallet?
A No.
Q And you walked back and went to the back of your house, is that correct?
A Yes.
Q Did you take out the money from your pocket?
A I was taking my money out of my pocket and putting it in my wallet.
Q And was taking the money out of your pocket and putting it in the wallet.
A Yes.
Q Was there any reason why you decided to take the money out of your pocket and put it in your wallet?
A I didn't want to lose it.
[21] Q You weren't afraid of losing it before, were you?
A Excuse me.
Q You weren't afraid of losing this money before, were you?
A No.
Q Now, how long were you standing in the back of your house before allegedly Herring came along?
A A few minutes.
Q A few minutes. Now, when you came back to the house, did you immediately start to put the money from your pocket into your wallet?
A Yes, I had it like this here at first, I counted it, then I put it in my wallet, was going to put it in my wallet.
Q Then you put it in your wallet?
A No.
Q How long were you in the back of your house before Mr. Herring came along?
A Just a few minutes.
Q Approximately? Only a few minutes, it could mean two, it could mean seven to me anyway.
A About three minutes.
Q Was there anyone else in the area?
[22] A No.

Q Now, how long did it take you to take the wallet out of your pocket?
A Less than a minute.
Q And which pocket was that wallet in?
A My rear pocket on the left-hand side.
Q Which pocket was the money in?
A My front pocket.
Q Now, how long did it take you to take the money out of your front pocket?
A Less than a minute.
Q All right. Less than a minute. In that minute you were taking it out and putting it in the wallet, you hadn't yet put it in the wallet, is that your claim?
A Right.
Q What is the name of your father?
A Allen Braxton.
Q Is that senior?
A Excuse me.
Q Is that Allen Braxton Senior?
A Yes.
Q In other words, he has the same name as you have?
A Yes.
Q Did you at any time live next door to Herring?
[23] A To Herring?
Q Yes.
A No.
Q You were never a neighbor of his?
A No.
Q Now, did you see Herring approach you?
A Yes.
Q How far away was he from you when you first saw him?
A I don't know exactly.
Q Well, judge it by distances in this room, if I may suggest it, when you first saw Herring at or about 6:00 P.M. on September 15th. Could you tell us by looking about here in this room approximately how far he was from you?
A About from here to the table.

Q This table over here?
A Yes.
Q Did he say hello to you?
A No.
Q He said nothing. And at that time what were you doing when you first saw him?
A I was just getting ready to put my money in my wallet.
Q Were you looking down at your wallet or were you [24]looking at Herring?
A I was looking at my wallet.
Q I see. Now, when you first saw Herring, did he have a knife on him?
A I didn't see it at the time.
Q You didn't see the knife?
A No.
Q And then he approached you, is that correct?
A Yes.
Q Did he touch you at all?
A No.
Q He did not?
A No.
Q Please speak a little louder.
A No.
Q He just walked up to you, is that correct?
A Yes.
Q And allegedly he said to you I am ill, is that correct?
A Yes.
Q Did he say what was wrong with him?
A No.
Q Did he look ill to you?
A No.
[25] Q What?
A No.
Q Now, how tall are you, Mr. Complainant?
A Five Eleven.
Q How tall is Herring?
A I don't know.
Q Is he taller than you?
A Yes.

Q What was he wearing?
A A suit.
Q He was wearing a suit?
A Yes.
Q Do you remember the color of the suit?
A No.
Q Tie and shirt?
A Yeah, he had a shirt on, I don't know if he had a tie.
Q And how close did he come to you at any time?
A From here to the small table right here.
Q From here to about the small table, would you say that was approximately four feet or so?
A Yes.
Q And what did he say to you? Will you please give us the exact words that Mr. Herring said to you as he stood in front of you approximately four feet from you?
[26] A He said, "Please give me some money, I am sick."
Q I see. And at that particular time did he have a knife in his hand?
A No.
Q What did you say to him about giving him the money?
A I told him no, I wasn't giving it to him.
Q All right. And, at that time when you told him you weren't giving him the money, was the money then in your wallet?
A No.
Q Where was it?
A It was still in my hand.
Q Now, how long was that money in your hand prior to the time Mr. Herring approached you?
A Until I ran in the house.
Q Now, when you said to him that you weren't going to give him the money, what do you allege he then did?
A What did Herring do?
Q Yes.
A Well, he took his hand out of his pocket and he had a knife, and he swung at me with it.

Q I see. He didn't hit you, did he?
A No.
[27] Q Can you describe to us the knife?
A It was about four inches long.
Q Color?
A Color of what?
Q Of the knife or the handle, whichever you might see.
A The blade was silver.
Q And the handle?
A I didn't see the handle.
Q Which hand did he have the knife in?
A It was his right hand.
Q Did he swing at you with his right hand?
A Yes.
Q Was the knife in that right hand?
A Yes.
Q When he swung at you, was he still approximately four feet away from you?
A No, he had moved up a step.
Q I see. Did he touch you with his hands at all?
A No.
Q Did you scream?
A No, I didn't.
Q Did you just turn around and go into the house?
A Yes.
[28] Q One more, please, Judge. Now, when you went in the house, Mr. Braxton, did you call the police?
A Call them on the phone?
Q Yes.
A No.
Q Did you have a phone?
A Yes.
Q Did you call the police?
A No.
Q Where did you go?
A I went to—
Q You went into the house, and tell us please what you did.

A I asked my mother where—
Q No, you cannot tell us what you said to your mother, tell us what you did.
A I walked out the front door looking—
Q You went in the back door, is that correct?
A Yes.
Q And you ran out the front door?
A Yes.
Q How much later did you run out the front door?
A As soon as I found out the officer wasn't in my house.
[29] Q You ran out the front door?
A Yes.
Q And where did you run to?
A To where the officer was.
Q And where was the officer?
A North Burgher.
Q How far is that? Roughly?
A I would say about double the length of this Courtroom. Where he was on North Burgher, where the officer was on North Burgher was the length of this Courtroom.
Q And now, this fellow Stubbs was a Housing Authority police officer, is that correct?
A Yes.
Q But you did not call the regular police department, is that correct?
A No.
Q Now, there is another officer by the name of Mineros (phonetic spelling), do you know him?
A No, I don't.
Q Wasn't there another officer with Stubbs that you saw after you went to the Housing Authority office?
A Yes.
Q What was the other officer's name?
A I don't remember his name.
[30] Q Will you describe him to us?
A He's about five six, on the heavy side.
Q On the heavy side. White or black?
A White.

Q Now, how long did you stay in your house after you ran into the house after leaving Herring and going out the front door, how long approximately were you in your house?
A It was less than a minute.
Q Did you leave off your money in the house?
A No.
Q You left your money?
A In my pocket.
Q Now, when you ran in the back door, didn't you have your money still in your hand?
A Yes.
Q When did you put the money in your pocket?
A When I got in the house.
Q And you stayed there approximately a minute?
A Yes.
Q And you ran out the front door?
A Yes.
Q Weren't you afraid Herring would come after you with the knife?
[31] MR. GIACOBBE: Objection, Your Honor.
THE COURT: Overruled, I will take it, you may answer.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Did you know where Herring had run to after you had run into the house?
A No.
MR. GIACOBBE: Judge, can we have the witness answer the other question first, he has been asked two questions.
THE COURT: They are two sepaarte questions.
MR. ADAMS: I didn't hear any answer, so I withdrew my question and went on to another.
THE COURT: Proceed.
MR. ADAMS: However, I will abide by anything the Court says, whatever the Court wants me to do. I didn't hear any answer.

THE COURT: Just go ahead with your examination.
MR. ADAMS: Fine, sir.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, did you run up to the Housing Authority office [32] or did you walk up?
A No, I had ran to somebody's house.
Q On the way?
A Yes, before I got to there.
Q Whose house did you run into?
A I don't know the name of the people.
Q But you ran into the house?
A I didn't run in, I ran to the house.
Q You ran to the house?
A Yes.
Q What did you do at that time at that house? Did you enter the house?
A No.
Q When you say you ran to the house, what did you do, run to the front door?
A Yes.
Q Then you ran away?
A No.
Q What did you do then?
A I knocked on the door.
Q Was there anyone home?
A Yes.
Q Who was home?
A I don't know the people.
[33] Q Who answered the door?
A A man.
Q Do you know the name of the man?
A No.
Q Were you looking for someone?
A Yes.
Q Who were you looking for?
A Stubbs.
Q I see. Did Stubbs live there?

A No.
Q How did you know he would be there?
A Because my uncle had told me that he was there.
Q Who had told you?
A My uncle.
Q Where did you see your uncle?
A In his house.
Q Where?
A In his house.
Q Where?
A By his house.
Q Now, you just told us that you ran from your house and you ran up to this party's house where you knocked on the door. Did you go to your uncle's house first?
A My uncle lives next door to this guy.
[34] Q Did you go there first?
A To my uncle's house? No.
Q How did your uncle tell you that Stubbs may be in this house that you were knocking on the door?
A Well, as I was on my way there, I asked him, did he see Willie Stubbs, and he said yeah.
Q You met your uncle on the way there?
A Yes.
Q And you asked him whether he saw Willie Stubbs, is that correct?
A Yes.
Q And I assume he told you he is in this house?
A Yes.
Q And you went to this house?
A Yes.
Q And you asked the party who answered whether Willie Stubbs was in the house?
A Yes.
Q What did this party say, yes or no?
A He said yes.
Q They said yes?
A Yes.
Q And Willie Stubbs came to the door?
A Yes.
[35] Q Did you ever get to the office then?

A To the office?
Q Yes, of the Housing Authority on North Burgher Avenue, you said you were running to.
A Yes.
Q Did you ever get there?
A To North Burgher?
Q Yes.
A Yeah.
Q How did you get there?
A I ran.
Q Now, maybe I am missing something here, let's go over this thing again, if I may.
When you left your house, you say you ran towards this individual's house, is that correct?
A Yes.
Q On the way you met your uncle?
A Yes.
Q What is your uncle's name?
A Herman Braxton.
Q Herman Braxton?
A Yes.
Q And you allegedly asked him whether he saw Officer Stubbs, is that correct?
[36] A Yes.
Q And he said he is probably in there, is that correct?
A Yes.
Q So you went and knocked at that door?
A Yes.
Q And Officer Stubbs was there, is that correct?
A Yes.
Q And allegedly you told Officer Stubbs what happened, is that correct?
A Yes.
Q Now, what was the address of this house where Officer Stubbs was?
A I don't remember the address.
Q How far was it from your house?
A About twice the length of this Courtroom.
Q And then where did you go with Officer Stubbs?
A Looking for Herring.

Q Looking for Herring. Did Officer Stubbs in your presence call the police department?
A Yes, he did.
Q You heard him?
A Yes.
Q Did any policemen come?
[37] A Yes.
Q What precinct did they come from?
A 120.
Q And did they come to this house where Officer Stubbs, where you saw Officer Stubbs?
A No.
Q Where did they come to?
A They had gone to the other projects up the street.
Q Did you see them come there?
A Yes.
Q Did you go with Officer Stubbs over to this office?
A Yes.
Q And how long did you remain in this house where you found officer Stubbs?
A I wasn't in the house.
Q You were just outside?
A Yes.
Q And did he come immediately with you?
A Yes.
Q And where you go to?
A We were walking up to the office.
Q You and Officer Stubbs?
A Yes.
[38] Q You were walking with him up to the office, is that correct?
A Yes.
Q Did you reach the office?
A We reached the office, we saw Clifford before we reached the office.
Q You saw Clifford before you reached the office?
A Yes.
Q What time is this? Let's go back over this thing then.

At or about 6:00 P.M. Clifford Herring approached you in the rear of the house, is that correct?

A Yes.

Q How long did he stay in and about your vicinity where you were?

A How long did Clifford stay there?

Q Yes.

MR. GIACOBBE: I will object, it's repetitious, it's been asked and answered.

THE COURT: It's cross-examination.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Yes.

A Excuse me.

[39] Q How long after Herring approached you and asked you for the $11 because he is sick, how much later did you run in the house?

A Right after it.

Q Approximately how long did it take, a minute, two minutes, half a minute, approximately?

A About a half a minute.

Q Then you ran into the house, is that correct?

A Yes.

Q You stated to me that you stayed in the house approximately one minute, is that correct, and then you ran up the street?

A No, I ran to the house where Stubbs was.

Q On the way to the house where Stubbs was, you met your uncle, is that correct?

A Yes.

Q How long were you with your uncle?

A About a minute.

Q And then you went to the door, is that correct? How long did it take to get from your uncle to this door which you knocked?

A About a half a minute.

Q And how long were you at this particular door after you knocked at the door?

[40] A It was over five minutes. Seven minutes.

Q About seven minutes?

A Yes.

Q And Officer Stubbs went with you?

A Right.

Q And you went looking for Herring, is that correct?

A Yes.

Q And how much later did you find Herring?

A About a half-hour.

Q So we have this, you found Herring at or about quarter to seven, am I correct in that?

A Around that time.

Q Around a quarter to seven you found Herring, and what was Herring doing at that time?

A Walking down the street.

Q Walking down the street. And it was at this time that you told Stubbs there is Herring, is that correct?

A Yes.

Q Did Stubbs know Herring?

A Yes.

Q And Herring is walking down the street, and the officer took him with him, is that correct?

[41] A Yes.

Q Did he take him in his car?

A No.

Q Did he walk him?

A Yes.

Q Did you go away at that time?

A No, I didn't.

Q You stayed?

A Yes.

Q Did you stay with Officer Stubbs when he arrested Herring?

A Yes.

Q You did. And were you present with Stubbs when he approached Herring?

A Yes.

Q And how long did the officer talk to Herring?

A I don't know how long he was talking to Herring.

Q Were you present all that time?

A Yes.

Q Did the officer search him?
A Yes, they searched him.
Q Did they find that knife you had said that Herring had threatened you with?
A Well, he had found the blade, I guess it was brokened [42] off the knife, I don't know.
Q Was that blade attached to anything?
A No.
Q It was not?
A No.
Q And did the officer, did Stubbs take Herring with him?
A Yes.
Q Did you go along?
A Yes.
Q Now, tell me, where did the officer take Herring?
A To the West Brighton Plaza Police Office.
Q Is that the Housing Authority Police Office?
A Yes.
Q How far is that from where you found Herring?
A About a half a block.
Q I see. And all three of you walked, is that correct?
A There was four of ous.
Q Who was the fourth one?
A The other patrolman.
Q The other patrolman, was that also a Housing Authority patrolman?
A Yes.
[43] Q And where did he come into the picture?
A He was there, he was out walking the beat, I guess, and met Medis, had told us what had happened?
Q Who told him what happened?
A Stubbs.
Q And the other officer approached also?
A Yes.
Q Did they put any handcuffs on Herring?
A Yes.
Q They did. And he walked handcuffed down the street to the office, is that correct?
A Yes.
Q Did you walk along with him?

A Yes.
Q Did you go into the office with him?
A Yes.
Q And were they any time alone with Herring when you weren't there?
A Yes.
Q And any time thereafter did the police come?
A Yes.
Q Now, when did Stubbs call the police?
A When he got in the office.
Q Did you—were you in the office at that time?
[44] A Yes.
Q And how soon after did the police come? Approximately?
A About fifteen minutes.
Q All this time, was Herring in handcuffs?
A No, he wasn't.
Q He was not?
A No.
Q They took the handcuffs off him when he came to the office?
A They didn't have handcuffs on him when they were carrying him in.
Q What?
A They didn't have handcuffs on him when they were taking him in.
Q Didn't you say they put handcuffs on him in the street?
A I made a mistake then.
Q They didn't handcuff him?
A No.
Q And did Herring go with them voluntarily?
A After awhile.
Q After awhile. Now, at the office of the Housing Authority, did you sign any papers?
[45] A No.
Q And did you go down to the precinct that night?
A Yes.
Q What time did you arrive at the precinct?
A I don't know the time I arrived there.
Q How did you get down to the precinct?

A Stubbs rode me down—no, the other officer gave me a ride down.

Q The other officer. Did Stubbs also go down to the police precinct?

A Yes.

Q Did you see the other officer and Stubbs at the police precinct?

A Yes.

Q And you stayed at the precinct how long?

A About an hour and a half.

Q Did you sign any papers at the police precinct?

A I don't remember.

Q And at any time did you hear Herring say that he was working at the time?

MR. GIACOBBE: Objection, Your Honor, it's hearsay.

THE COURT: I will take it, overruled.

CONTINUING CROSS-EXAMINATION

[46] BY MR. ADAMS:

Q At any time did you hear Herring say that he was working at the time that allegedly you claim that he waived a knife at you?

A Yeah, he said that.

Q He said he was working, is that correct?

A Yes.

Q Who did he say he was working for?

A He didn't say.

Q In other words, he said he was innocent, is that correct?

A Yes.

Q And he said he was working at that time, is that correct?

A Yes.

Q And the police officers in your presence called up someone to check on this story, yes or no?

A I don't know, because after awhile I was taken out of the room.

Q After awhile you were taken out of the room?

A Yes.

Q Now, did you go down to Court the following day?

A Yes, I did.

[47] Q While I'm at it, Mr. Giacobbe, would you extend the courtesy of turning over the Grand Jury minutes of this particular witness with the permission of the Court, please. I will make that request through the Court.

MR. GIACOBBE: I am now handing to Mr. Adams the transcript of this witness' Grand Jury testimony consisting of pages 2 through 9, taken on November 8, 1971.

MR. ADAMS: Judge, may I have a moment?

THE COURT: All right.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Page 4, Mr. Braxton, you remember being asked this question by Mr. Braisted and giving this answer?

"Question: When he swung at you, did he touch you? Answer: No, and then after that I ran into my house, and I thought the cop was still there, and he wasn't there, and I had to run up the street to get him. I had caught Clifford up on Castleton and Broadway."

Now, did you tell this to us on cross-examination here that you and the officer saw Herring on Broadway?

A Yes.

Q Which is correct, what you gave before the Grand Jury, you said, "I had caught Clifford up on Castleton and [48] "Broadway," or you and the police officer?

A It was me and the police officer.

Q Now, officer—I mean, Mr. Braxton. You said you knocked on the house up the street from where you lived, and finally Officer Stubbs came to the door, is that correct? And then you told us that he came out and walked with you, is that correct?

A Yes.

Q And while walking with you, you saw Herring, is that correct?

A Yeah, after awhile.

Q How long were you walking?
A About a half an hour.
Q You were walking, just walking around the place looking for Herring?
A Yes.
Q At any time did you get to the police office or the Housing Authority office?
A After the officer had made the arrest.
Q Not before?
A No.
Q You remember being asked this question and giving this answer before the Grand Jury, and these questions were posed to you by Mr. Braisted, page 5.
[49] "Question: What did Patrolman Stubbs do after you told the officer what had happened? Answer: He came out of the house that he was in and ran down to the office and phoned up to the other officers about Clifford Herring."
Now, which did he do? Did he go to the office first or did he go walking around looking for Clifford Herring?
A He had went down to the office, but it wasn't the police office.
Q I asked you before whether he went to the Housing Authority office, and you said no.
A This wasn't the Housing Authority office that he made the phone call at.
Q What was it?
A It was just a regular office building.
Q Mr. Braxton, after you ran away from Clifford Herring from the back of the house, you ran into your house, is that correct?
A Yes.
Q Did you ever look out to see what happened to Herring?
A No.
Q Never looked out?
A No.
[50] Q Was there anyone else in the house then when you ran in besides your mother?
A Yes, my sister.

Q How old is she?
A She is twenty.
Q Now, at any time in that particular one minute that you say you were in the house, at any time did you look back or out to see where Herring had gone?
A No.
Q On page 7, line 4, do you remember being asked this question and giving this answer?
"Question: Mr. Braxton, where did he go and what did he do? Answer: Standing there for awhile, and I didn't hear what he said. I ran into my house. He didn't know I lived here, and I looked back out there, and he was gone."
Now, which is correct, the testimony you are giving here or the testimony you gave before the Grand Jury?
A The testimony I gave here.
Q You never did look out?
A No.
Q So the testimony you gave before the Grand Jury is [51] incorrect, is that correct?
A Yes.
MR. GIACOBBE: I am going to object, the testimony speaks for itself, it didn't say he looked out the window, it says he looked back, it didn't say from what point or where.
MR. ADAMS: "And I looked back out there, and he was gone."
THE COURT: I heard it. Go ahead.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, Mr. Braxton, you remember being asked these questions and giving these answers before the Grand Jury? Page 8, starting at the top.
"Question: Could you describe to the gentlemen of the Grand Jury what it was that Clifford Herring had in his hand when he swung at you? Answer: Well, I seen him go like this. Mr. Braisted: Indicating a flick

of the wrist. Answer: Yes. And all I saw was something that looked like a blade."

Now, didn't you before tell us that this blade was approximately six inches long, had a shiny handle?

A Six inches long, no.

Q Now, was this a blade or was this a knife?

[52] A Blade. I seen the blade.

Q Then you didn't see a knife then?

A I didn't see the handle, I seen the blade.

Q How big was this blade?

A Around four or five inches.

Q Was it shiny?

A No. No.

Q What's that?

A I said no.

Q It was not shiny. Do you remember being asked this question and giving this answer about the description of the knife to the Grand Jury in response to questions by Mr. Braisted? Page 8, line 17, "Mr. Braxton," —"Question: Was it shiny? Answer: I don't remember if it was shiny or not."

Now, which was it, shiny or not, was it correct what you said before the Grand Jury or was it correct what you said here in Court?

A It's correct what I said here.

Q Correct what you said here today?

A Yes.

Q And what you said before the Grand Jury was incorrect, is that correct?

A Yes.

[53] Q What?

A I said yes.

Q Now, could you, if the Court would permit, stand up and show us exactly the motion that Mr. Herring made at you in the rear of your house at or about 6:00 P.M. on September 15th, 1971. May the witness do that, sir?

THE COURT: He may. You may stand up and show us what Mr. Herring did.

THE WITNESS: He went like this here.

THE COURT: Did he take a step forward towards you?

THE WITNESS: Yes.

THE COURT: He swung with his right hand with the blade sticking out, the top part of his hand or the bottom part of his fist?

THE WITNESS: The top.

THE COURT: Did you step back as he swung?

THE WITNESS: Yes.

THE COURT: Had you not stepped back, would he have hit you with the blade?

THE WITNESS: Yes, he would have.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Braxton, do you remember being asked this [54] question and giving this answer before the Grand Jury?

"Question: Could you describe to the gentlemen of the Grand Jury what it was that Clifford Herring had in his hand when he swung at you? Answer: Well, I seen him go like this. Mr. Braisted: Indicating a flick of the wrist. Answer: Yes. And all I saw was something that looked like a blade."

Is that correct?

A Yes.

Q Now, when Herring was speaking to you in the back of the house, did he yell at you or speak softly or what?

A He was speaking soft.

Q He was speaking softly?

A Yes.

Q Was he wearing colored glasses?

A No.

Q No?

A No.

Q He never raised his voice, is that correct?

A No, he didn't raise his voice.

Q He did not raise his voice?

A No.
Q Do you remember being asked this question by Mr. Braisted and giving this answer on page 9?
[55] "Was Clifford Herring speaking in a loud voice or low voice? Answer: It was kind of loud."
Do you remember giving that testimony before the Grand Jury?
A No.
Q You don't remember it?
A No.
MR. ADAMS: Would the District Attorney, the prosecutor of this case, would he admit that this was the question and this was the answer that was taken down by the District Attorney's stenographer?
MR. GIACOBBE: Judge, I will stipulate—I have no objection to counsel offering these entire nine pages into Evidence, if he so desires.
MR. ADAMS: Fine, Judge, you can see for yourself the way these things read. Can we have the original, Mr. Giacobbe?
MR. GIACOBBE: That is the original.
THE COURT: Mark it as Defendant's Exhibit A.

(Defendant's Exhibit A was received and so marked into evidence. Grand Jury minutes of Allen Braxton.)

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

[56] Q Mr. Braxton, do you know a Mrs. Taylor who lived at 9 Markham Drive?
A No.
Q No?
A No.
Q Did you ever live near number 9 Markham Drive?
A I live at 7.
Q Is that next door, is that correct?
A Yes.
Q Did a Mrs. Taylor live there?
A No.

Q How long have you lived there?
A About nine years.
Q Did you ever see Herring live there in the last nine years?
A No.
Q Do you know whether your father and Clifford Herring were ever in the Army together?
A Yes.
Q Were they?
A From what I hear.
Q They were, is that correct?
A Yes.
Q Mr. Braxton, have you ever been arrested?
[57] MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Braxton, have you ever been convicted of a crime?
A No.
Q Do you know Leon Tucker?
A Yes.
Q Do you know George McCombs?
A Yes.
Q Did you ever commit a crime with those two men?
A Yes.
MR. GIACOBBE: Objection, Your Honor, to the form of the question.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Were you ever arrested with George McCombs and Leon Tucker?
MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

[58] Q Were you ever arraigned in this Court?
MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, Mr. Braxton, how many times did Herring swing at you?
A He made one swing when I was standing at him.
Q Then you stepped back, is that correct?
A Yes.
Q Then did you run in the house?
A Yes, but—
Q Sorry, I don't want to—
A —I seen him making a motion to get ready to make another swing, but I was gone.
Q So actually he swung at you once, is that correct?
A Yes.
Q And that was with something that looked like a blade, is that correct?
A Yes.
Q Now, do you remember being in the Criminal Court on September 16th, 1971, which is the day after the commission of this alleged crime?
[59] A Yes.
Q And do you remember, Mr. Braxton, stating in the complaint in the Criminal Court that Mr. Herring swung at you several times with the knife? A couple of times with the knife, is that correct?
A Well, the second time I was making—when he made the half move.
Q But he didn't swing at you the second time, is that correct?
A No.
Q What does a couple of times mean to you?
A Two.

Q Two. Could it mean three? And actually it wasn't a knife, it was a blade, is that correct?
MR. GIACOBBE: Objection to the double question that included counsel arguing with the witness on the second question.
MR. ADAMS: I will withdraw if the Court thinks that's improper.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Now, did he swing at you once, twice or three times?
A He swung at me once.
[60] Q And was it with a knife or with something that looked like a blade?
A Something that looked like a blade.
MR. ADAMS: I ask the Court at this time to take into consideration for the purpose of saving time, a copy of the felony complaint in the Criminal Court, which I believe to be in the possession of this Court, and would like to offer that in Evidence to show inconsistencies with the testimony given here before this Court. And for that purpose and that purpose only, I would like to offer that into Evidence.
THE COURT: The Court will take into consideration whatever is in the file of this Court.
MR. GIACOBBE: No objection, Your Honor, to the Court examining the complaint.
MR. ADAMS: I will offer it in Evidence then if there is no objection, Mr. Giacobbe.
MR. GIACOBBE: I have no objection to your offering the Criminal Court complaint into Evidence.
THE COURT: All right, we will deem it marked in Evidence as Defendant's Exhibit B in Evidence.
MR. ADAMS: May I read it or will the Court take cognizance of it?
THE COURT: If you want to read it, go ahead.
[61] MR. ADAMS: The complaint in the Criminal Court reads as follows: Complainant states that at the

above mentioned time and place, the defendant did approach him with a knife in his hand and did demand money from him and did swing at him a couple of times with the knife. The complainant states that he did manage to duck away from the defendant and into his home. Sworn to on September 16th, 1971.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Braxton, how old are you?
A Eighteen.
Q When were you eighteen?
A May 17th.
Q How far did you get in school?
A Eleventh year.
Q Did you complete the eleventh year?
A No.
Q Did you complete ten full years?
A Yes.
Q And where was the tenth year?
A Susan Wagner.
Q High School?
A Yes.
[62] Q And what kind of a course did you take there?
A Commercial.
Q And what age did you quit school?
A Seventeen.
Q And when you quit school, did you get yourself a job?
A Yes.
Q And where did you get a job after you quit school?
A Wagner College.
Q And how long did you work in Wagner College? Approximately?
A About five months.
Q After the five months, did you work somewhere else?
A Yes, I did.
Q Yes?

A Yes. Wait a minute. No, I didn't, no.
Q Were you working on September 15th, 1971?
A Yes.
Q Where were you working?
A Frank Alfredo's.
Q Doing what?
A Sorting metal.
Q When did you start working there in connection or [63] in reference to September 15th, 1971?
A I don't remember.
Q When did you quit working there?
A Sometime in September.
Q Now, this crime allegedly happened September 15th, '71, is that correct?
A Yes.
Q And you quit when after this crime happened?
A Yes.
Q How much after this crime happened, do you know?
A About a week.
Q About a week later?
A Yes.
Q And did you get yourself another job?
A No.
Q Mr. Braxton, have you ever used narcotics?
A Yes.
Q And what have you used?
A Heroin.
Q And are you addicted to heroin?
A No.
Q How many times have you used heroin in your life?
A I don't know. Between four months. In between four months.
[64] Q In between four months. Now, in reference to September 15th, 1971, when did you use heroin before that?
A The month before September.
Q Once or twice?
A I don't know.
Q Did you inject it youreslf?
A No.

Q How did you consume it?
A I sniffed it.
Q Did someone give it to you or did you purchase it?
A It was given to me.
Q It was given to you. Did you ever use marijuana?
A Yes.
Q And how long had you been using marijuana?
A Not long.
Q When was the last time you had any marijuana?
A I don't recall.
Q Have you ever taken any ups or downs?
A No.
Q No?
A Yes—no.
Q Have you ever been drunk in your life?
[65] A Yes.
Q How many times would you say you have been drunk?
A I don't know. I don't know.
Q You don't know? Was it a number of times?
A I would say no more than five or six times.
Q Have you also drank liquor in the Capital Bar?
A Yes.
Q And when was the last time you been in the Capital Bar?
MR. GIACOBBE: Judge, I would object, it seems to be beyond the scope of this whole case.
THE COURT: What is it for?
MR. ADAMS: Judge, I will abide by the Court's decision, I am an officer of the Court, I believe this is going to the issue of veracity, Judge, and character.
THE COURT: What's the significance of where he drank?
MR. ADAMS: I'm sorry, sir, I didn't hear.
THE COURT: What's the significance of where he had a drink?
MR. ADAMS: Correct, I think the Court is correct [66] in that. I agree on that.

CONTINUING CROSS-EXAMINATION

BY MR. ADAMS:

Q Have you ever drank any liquor with Herring?
A No.
Q May I ask you, Mr. Braxton, Leon Tucker and George McCombs are friends of yours?
A George is my cousin.
Q And Leon?
A He's a friend.
Q Have you gone out with them?
A Going out?
Q Have you been out with them socially?
A I don't understand what you mean.
Q Have you gone out to parties or dances with Leon and George McCombs?
A George, I have.
Q Mr. Braxton, have you ever been in jail?
MR. GIACOBBE: Objection, Your Honor.
THE COURT: Objection sustained.
MR. ADAMS: No further cross-examination.

REDIRECT EXAMINATION

BY MR. GIACOBBE:

Q Mr. Braxton, on September 15th, 1971, did you [67] take any drugs of any kind?
A No.
Q Now, you testified this afternoon that you saw the defendant at six o'clock on September 15th, 1971, is that correct?
A Yes.
Q Had you seen the defendant Herring at any time before six o'clock on that date?
A Yes.
Q About what time was that?
A I don't remember the time.
Q Was it in the morning or the afternoon?
A It was in the afternoon.

Q Was it in the early afternoon, that is around noontime—

A No, it was just before I had seen him behind my house.

Q And where did you see him? The first time on September 15th, 1971.

A Broadway.

MR. ADAMS: Judge, may I at this time object to this, I don't know whether this is pertinent, and I don't know whether this is proper cross-examination. There were no questions asked on cross-examination in this particular vein, Judge. I think [68] it's improper redirect examination.

THE COURT: Objection sustained.

MR. GIACOBBE: Judge, this is a non-jury trial, and counsel has asked many questions, and I just have a few questions on that subject. It is non-jury, and I don't see what harm—

THE COURT: Same rules.

MR. GIACOBBE: All right, no further questions, thank you, Mr. Braxton.

THE COURT: Mr. Braxton, had you ever had occasion to talk to Clifford Herring prior to September 15th, 1971?

THE WITNESS: No, I haven't.

THE COURT: As far as you know, were there any hard feelings between your father and Clifford Herring?

THE WITNESS: I don't know.

THE COURT: You had heard that they were in the Army together?

THE WITNESS: Yes.

THE COURT: Any hard feeling between Clifford Herring and any member of your family as far as you know?

THE WITNESS: No.

THE COURT: Any disputes or fights?

[69] THE WITNESS: No.

THE COURT: Okay, anything else?

CONTINUING REDIRECT EXAMINATION

BY MR. GIACOBBE:

Q Mr. Braxton, the Judge asked you if you ever had occasion to talk to Clifford Herring before September 15th, 1971. Did Clifford Herring ever talk to you before six o'clock on September 15th, 1971?

MR. ADAMS: I object to this now, I did not object to the Court's questions, and—

THE COURT: You—

MR. ADAMS: You ruled—

THE COURT: You may object, you can object any time the Court asks a question—

MR. ADAMS: That's correct, sir, I will put in my objection now, because the same question—

THE COURT: —objection to his or my question.

MR. ADAMS: I will object at this time to the defendant's question. Rather to the prosecutor's question.

THE COURT: I will sustain the objection. Do you have any more questions of this witness, Mr. Adams?

[70] MR. ADAMS: No, sir. Judge, may I just ask this before Mr. Braxton leaves, may I just say this, Judge. Is it possible—I would like to make the request that Mr. Braxton make himself available to me in the event I may need him, because I understand this case is going over until tomorrow. I don't know what's going to happen tomorrow, Judge, and I just wondered whether the Court would direct that he make himself available when we should need him. This is a non-jury case, we should proceed as speedily as possible.

THE COURT: You may want to call him as your witness?

MR. ADAMS: Right.

THE COURT: What's your situation?

MR. GIACOBBE: If I may speak for him on that, we had gone through extensive arrangements with the United States Marine Corps to have this witness taken off an airplane yesterday afternoon and brought here. I have spoken to a sergeant from the Marine Corps, and promised we will make him available tomorrow morn-

ing to be returned back to the Marine Corps and sent on his way for basic training. He can be here tomorrow morning, but the Marines have been very generous in [71] their cooperation with us.

THE COURT: He can be here sometime in the morning.

All right, Mr. Braxton, return in the morning at ten o'clock, you can have him now.

MR. ADAMS: I have no more cross-examination at this time. I don't know what may develop, because there will be other witnesses.

THE COURT: The Marine Corps has made this trial possible by accommodating the People. We cannot keep Mr. Braxton around indefinitely, you had a chance to ask your questions.

MR. ADAMS: Right, Judge, I cannot say I have not.

THE COURT: Return tomorrow morning. Do you have any more evidence?

MR. GIACOBBE: That's all the evidence I have for this afternoon, I expect to have another witness in the morning.

THE COURT: All right, we will go over until ten o'clock.

MR. ADAMS: May I approach the Bench for a brief moment.

(At this point, a discussion was held off the [72] record.)

THE CLERK: The defendant is remanded.

(At this point, a recess was declared until ten o'clock A.M., February 4th, 1972.)

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[100]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART I

Ind. No. 311/1971

Attempt. robbery 1st deg.

TRIAL

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, N.Y.
Friday, February 4, 1972
2:22 p.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
Appearing for the People

By: ANTHONY I GIACOBBE, ESQ., ADA, of Counsel

SEYMOURE ADAMS, ESQ.
Appearing for the Defendant

IRWIN GOLDSTEIN
Official Court Reporter

[101] (At 2:22 p.m. defendant assumes seat at counsel table.)

311/1971, People against Clifford Herring. People by Mr. Giacobbe; defendant by Mr. Adams. Defendant is present with counsel. Are both sides ready to proceed?

MR. GIACOBBE: People ready.

THE DEFENDANT: Your Honor, I would like to read a statement to the Court, please.

THE COURT: You have an attorney.

(Defendant hands paper to Mr. Adams.)

MR. ADAMS: Judge, in essence, the statement that the defendant hands to the Court, is the fact that he feels I have not represented him properly. Now, Judge, I will hand the papers to you. The Court, whatever it sees fit—

THE COURT: Mark that as Court's exhibit one.

(Defendant's handwritten statement marked Court's exhibit 1.)

THE COURT: You wish to discharge your attorney?

THE DEFENDANT: Not at this particular point, your Honor. I would like my statement read.

THE COURT: Because I will. I will read it [102] for the record, although the letter, whatever it is, is in evidence.

"If the Court please, your Honor, I have a statement to make. It seems to me that my counsel has failed to give me a probable—probably means proper—representation concerning my trial. Your Honor please, I have obtained evidence to prove that this Honorable Court, that my counsel has completely disregarded these matters. I, your Honor, at this present time I am willing to confront this Honorable Court with the evidence that the district attorney is aware of such evidence existing. The district attorney obtained that evidence in the criminal court. The district attorney made an open statement to the Court that he, the district attorney, was given reliable info by three officers that at the time the alleged crime was committed, that the defendant was working. I ask this Honorable Court and my counsel to obtain a

copy of the said minutes from the criminal court in order to sustain my statement in this court. The district attorney made this said statement in open court that he, parenthesis, DA, closed parenthesis, has received info by, maybe it is three officers, which he [103] believed at that time that the info was reliable from reliable persons. Mr. Gilroy, my former attorney, was present when this info was given to the district attorney."

Get Gilroy.

"The district attorney, on obtaining that said info, made a motion to the Court that the district attorney receive that info which convinced him to make a motion to the court to have the defendant paroled in his own custody. Therefore, I request that this Honorable Court issue an order to obtain these three officers and Mr. Gilroy, and the district attorney be brought in this court to verify my alleged statements. Thank you, your Honor, for your time and consideration."

MR. ADAMS: Judge, since the Court has read this into the record, I think I have the right to very briefly defend myself, Judge.

THE COURT: I will hear you.

MR. ADAMS: You know, Judge, I have been practicing for 22 years, and I am just that type of a nut, in quotes, to go out of my way—

THE COURT: Mr. Adams—

MR. ADAMS: No, I want to tell this Court. [104] I spent five hours at the risk of my life, Judge, on Wednesday, in an area that many white people wouldn't go into. And I spent my time until midnight tracing down some of the things this particular defendant says. I would like to withdraw at this time, Judge.

THE COURT: Mr. Adams, I will deny your application to withdraw. When this trial is over, I will give you an opportunity to make a statement for the record. But at this time we are in the middle of a trial. Now, Mr. Herring, I ask you again, do you want me to discharge Mr. Adams as your attorney?

THE DEFENDANT: Your Honor—

THE COURT: Do you understand this, before you make a decision—

THE DEFENDANT: Your Honor—

THE COURT: Just hear me.

THE DEFENDANT: —all I'm asking is that I get my proper witnesses together, the information, and this is all I'm asking. This is all I'm asking, Your Honor.

THE COURT: Well, Mr. Herring, I ask you again—

THE DEFENDANT: I'll keep my lawyer, I'll keep [105] my lawyer.

MR. ADAMS: I request to withdraw, Judge.

THE COURT: I cannot allow you to withdraw at this point, Mr. Adams. I realize that this is a trying situation, but I cannot permit you to withdraw at this point.

MR. ADAMS: I can appreciate the position the Court is in, but at the same time, Judge, I don't want to be maligned.

THE COURT: I will hear you after the trial is over. Now, I will get Mr. Gilroy here. I have no other names that have been disclosed to me by your statement that I just read into the record. There is no one else I can summon on your behalf, even though, of course, it is not my responsibility to find witnesses for the defense or the prosecution. But I will get Mr. Gilroy and make him available to you, Mr. Herring, and Mr. Adams. Now, let us proceed with the trial. Call your next witness.

MR. GIACOBBE: Mr. Stubbs.

WILFRED STUBBS, called as a witness in behalf of the People, after first being duly sworn, testified as follows:

[106] (The witness states he resides at 247 Westwood Avenue, Staten Island, N.Y.)

(2:30 p.m.)

DIRECT EXAMINATION

BY MR. GIACOBBE:

Q Sir, on September 15, 1971 were you employed by the New York City Housing Authority as a police officer?

A I was.

Q Were you on duty, sir, in the afternoon of that day?

A Yes.

Q Do you know Allen Braxton, the complainant in this case?

A Yes.

Q Do you know Clifford Herring, the defendant in this case?

A Yes.

Q Did you know them both prior to September 15, 1971?

A Yes.

Q On September 15, 1971, what area were you assigned to?

A Markham Homes, in West Brighton, Staten Island.

Q Now, shortly after 5 p.m. on September 15, 1971, did you have occasion to go into the home of Allen [107] Braxton on Staten Island?

A Yes, I did.

Q Where was his home located?

A Seven Markham Drive, I believe.

Q What was the purpose of your going into his home?

A I was—

MR. ADAMS: Objected to, unless it has some connection with this particular crime, Judge.

THE COURT: Overruled, I will take this.

A I was checking out a particular building in the housing development that had a lot of drug traffic; had it under surveillance.

BY MR. GIACOBBE:

Q Were you making your surveillance from the inside of the Braxton Home?

A Yes, I was.

Q What time did you leave the Braxton home?

A A little after five.

Q Where did you go from there?

A I went to another building, adjacent to this building I had under surveillance.

Q Who lived in the building that you next went to?

A Allen Braxton's uncle.

[108] Q What is his name?

A Herman Braxton.

Q How far was the home of Mr. Herman Braxton from the home of the complainant Allen Braxton?
A Approximately hundred feet.
Q When you went to the home of Mr. Herman Braxton, did you go inside that house?
A Yes, I did.
Q Did you remain inside that house?
A Yes, I did.
Q When did you leave that house?
A Approximately about 20 to six, roughly.
Q Where did you go when you left?
A I went to the—I checked around—I walked around the area.
Q Did you stay in that area?
A No. I came back to that area.
Q In other words, you left it and then came back?
A Yes.
Q Now, after you came back, did there come a time when you saw Allen Braxton, the complainant in this case?
A Yes.
Q Approximately when was that?
[109] A It was a little after six.
Q Where were you when you saw him?
A I was at the rear of 51 Wayne Terrace.
Q What did he tell you, if anything, when he saw you?
MR. ADAMS: Objected to, unless it was said in the presence of the defendant, sir.
THE COURT: Objection sustained.

BY MR. GIACOBBE:

Q Did he tell you something?
A Yes, he did.
Q After he told you something, what if anything did you do?
A I took Mr. Braxton around the area and I checked around the area.
Q What were you checking for?
A I was looking for Mr. Clifford Herring.
Q The defendant in this case?

A Yes.
Q What areas did you look in?
A I checked all of the Markham Homes, the whole area of the Markham Homes, all the ways up to Henderson, up Broadway.
Q Was Allen Braxton with you during that period [110] of time?
A Yes, he was.
Q Approximately how long a period of time did the two of you stay together for the first time?
A Approximately 20, 25 minutes.
Q What happened after that?
A I told Mr. Braxton if he happened to see Mr. Herring around the area, to let me know, and I went back to patroling the Markham Homes.
Q Now, before the time when you and Mr. Braxton separated—I withdraw that question. From the time that Braxton first spoke to you by his uncle's house, where did you and Braxton go, if any place, right away from there?
A We went to a police room. We have a room at the Markham Homes. It's just with a telephone.
Q What did you do at the police room?
A I called the other officer I was working with. He was working up the West Brighton Houses, and I told him to be on the lookout for Mr. Herring.
Q And then you say it was during this period that took 20 or 25 minutes, I believe you said, that you and Braxton stayed together. Right?
A Yes.
[111] Q After you and Braxton separated, did you and Braxton see each other again?
A Yes, we did.
Q How much time passed before that happened?
A I'd say approximately about an hour.
Q When you saw Braxton, where was it?
A I seen him on Broadway.
Q Who else, if anyone, did you see?
A I see Mr. Herring.
Q Were they together?
A No, they were not.

Q Where was the defendant Herring and where was Braxton?

A The defendant Herring was—I'd say he was on—I would say the east side of Broadway. That would be PS 18 side, and Mr. Braxton was on the project side, that would probably be the west side of Broadway.

Q What side were you on?

A I was coming up the west side, the project side, and I seen Mr. Herring on the opposite side of the street, and I walked over to that direction.

Q How long was this now from the time that you had left Braxton before?

A I'd say approximately an hour.

[112] Q Now, what did you do when you crossed the street to the side that Herring was on?

A I walked over to Mr. Herring and I told him that Mr. Braxton said that he attempted to rob him.

Q What did Herring say to you?

A Mr. Herring said that he was looking for me, that he heard I was looking for him, and he said that he would—I asked him would he come over to the office with me, and he agreed to come under his own free will.

Q But he said to you that he had heard that you were looking for him. Is that correct?

A Yes.

Q Was he placed under arrest at that time?

A No, he wasn't placed under arrest at that time.

Q What did you do after you apprehended him on the street?

A I asked him to come to the police room in West Brighton Houses, and he came to the police room, and I told him what the situation was, that Mr. Braxton said he attempted to rob him, and Mr. Herring denied it.

Q Was Braxton there at the time?

A Yes, he was.

Q Was the defendant placed under arrest at that time?

[113] A Yes, he was.

Q Now, did you search the defendant?

A Yes, I did.

Q What if anything did your search reveal?

A I found a small knife and—

Q Was it a knife or—

A A knife on one end, a—

Q May we see what you found?

A Yes.

(Witness produces.)

Q Now, what is being handed to me now, is this what was taken from the person of Clifford Herring?

A Yes.

Q And is it in substantially the same condition now as it was in at the time that you took it from his person?

A Yes.

MR. GIACOBBE: Your Honor, at this time I offer this into evidence as People's Exhibit 1.

MR. ADAMS: May I ask some questions in reference to this, Judge?

THE COURT: You may.

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[114] (2:38 p.m.)

VOIR DIRE EXAMINATION

BY MR. ADAMS:

Q When you took this from Mr. Herring, where did you put this?

A Where did I put it?

Q Yes.

A I put it into a white envelope that I had.

Q What did you do with the white envelope after that?

A I brought the white envelope down to the precinct, and the precinct gave me a brown envelope, manila envelope.

Q Gave you what?

A This manilla envelope (indicating).

Q And you put it in this manila envelope?

A Yes.

Q Has this always been in your possession?

A No, it was at the police property clerk.

Q Now, you said you placed the defendant under arrest when you got to the police office. Is that correct?
A Yes.
Q Did he have anything else on him besides this?
A No, sir.
Q Nothing else?
[115] A Just personal items, his wallet, and I returned his wallet to him.
Q I see. Now, you are a housing authority police officer. Is that correct?
A I was.
Q You were?
A Yes.
Q You are not now?
A No, I'm not.
Q At that time, though, you were?
A Yes, I was.
Q And you allege that you have authority to arrest someone?
A Yes, I do.
MR. GIACOBBE: Objection, your Honor, objection.
THE COURT: Yes, you wil get a chance to cross-examine this witness. This is just a voir dire on the admissibility of People's exhibit one. Have you completed your voir dire?

BY MR. ADAMS:

Q Did Mr. Herring consent to you searching him?
A I placed him under arrest.
Q When you pleased him under arrest, did you have any kind of a statement at that time from Mr. [116] Braxton, a written statement?
A No, I did not have any written statement, sir.
Q So that even though Mr. Herring denied the thing, you still placed him under arrest. Is that correct?
A Yes, sir.
Q What was Mr. Herring wearing when you arrested him?
A He was wearing a grey suit, and I can't recall now the type of outer garment that he had. He had a grey suit on, a sport jacket.

MR. ADAMS: Judge, I object to this on the grounds that it is a result of an illegal search and seizure.
THE COURT: You had placed the defendant under arrest before you searched him and found that. Is that correct?
THE WITNESS: Yes.
THE COURT: Objection overruled. That will be received in evidence as People's exhibit one.

(Thereupon, chain with two instruments received in evidence and marked People's Exhibit One.)

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[117] (Cont. 2:42 p.m.)

DIRECT EXAMINATION

BY MR. GIACOBBE:

Q Sir, approximately what time was it when you saw the defendant Herring on Broadway near PS 18?
A Approximately about 8 o'clock.
MR. GIACOBBE: Thank you very much. I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Stubbs, how long had you been working as a —I am sorry, Judge.
THE COURT: Go right ahead.
Q How long, Mr. Stubbs, had you been working for the housing authority as a police officer prior to September 15?
A Three years.
Q Subsequent to September 15th?
A About four more months.
Q Four months. So that you recently quit, or you were removed?

MR. GIACOBBE: Objection, your Honor. When was his employment ended?

Q Say four months after September 15—I will withdraw that, Mr. Giacobbe. Tell us the date when you terminated your work with the housing authority [118] police?

A December 2nd.

Q Was it at your choice?

MR. GIACOBBE: Objection, your Honor; that is irrelevant and immaterial to this case.

MR. ADAMS: No, I don't think it is, Judge.

MR. GIACOBBE: It certainly is, your Honor.

THE COURT: I will take it subject to connection. You may answer it.

A I was dismissed.

BY MR. ADAMS:

Q Now, between September 15 and December 2, 1971, how many arrests did you make? Approximately, if you don't know.

A Approximately seven or eight.

Q Seven or eight?

A Yes.

Q And, Mr. Stubbs, did you testify here in response to Mr. Giacobbe's questions here, did you make any reports concerning this entire incident?

A Only at the housing level.

Q Did you make reports there?

A Yes.

Q And you have those reports with you?

[119] A No, that's housing authority.

Q Now, in order to testify here today, did you review those reports?

A No, I did not review. No, sir.

Q You did not look at them at all?

A No, sir.

Q When did you make out those reports?

A The night that I arrested Mr. Herring.

Q The night that you arrested Mr. Herring?

A Yes.

Q And since then you have not looked at those reports?

A No, I haven't, sir.

Q Now, you testified before the grand jury, did you not?

A Yes, sir.

Q Did you read your grand jury testimony?

A Did I read my grand jury?

Q Yes.

A No, sir.

Q Did you speak to Mr. Giacobbe prior to this date?

A Yes, I did.

Q When did you speak to Mr. Giacobbe prior [120] to today?

A This afternoon.

Q I said prior to today, before today.

A Oh, at the grand jury.

Q I see. And then next you spoke to him today. Is that correct?

A Yes.

Q Did you discuss the evidence or the testimony with Mr. Giacobbe that you were going to give today? Did you discuss it?

A Yes.

Q Did Mr. Giacobbe tell you the testimony that was given by Mr. Braxton?

A No, he did not.

Q Mr. Giacobbe—

MR. ADAMS: With the Court's permission, may I look at the grand jury testimony of the police officer?

THE COURT: You may.

MR. GIACOBBE: Your Honor, may the record show that I am handing to Mr. Adams at this time the testimony given by this officer consisting of pages 10 through 14 on the same date as the testimony given by the complaining witness (handing to [121] Mr. Adams).

BY MR. ADAMS:

Q Now, the pages that Mr. Giacobbe gave, did you ever read this prior to your ascension on the stand today?

A No, I did not.

Q Now, this report that you made to the housing authority, was it on housing authority forms?

A Yes.

MR. ADAMS: Judge, at this time I don't think it is improper, perhaps it is, but I will submit to the Court, I think that the defense is entitled to look at those housing authority reports completed by Mr. Stubbs in reference to this incident, and I respectfully request that they be produced.

THE COURT: Do you have then with you?

THE WITNESS: No, I do not.

THE COURT: Do you have the reports?

MR. GIACOBBE: No, I don't, your Honor.

MR. ADAMS: I will leave that go for the moment, please, Judge.

BY MR. ADAMS:

Q Mr. Stubbs, when you arrested the defendant, he [122] told you he did not commit this crime. Is that correct?

A That's correct.

Q He told you, I think, that he was working. Is that correct?

A That's correct.

Q And did he tell you he was working for some fellow by the name of Taylor on Campbell Avenue?

A That's correct.

Q And Mr. Taylor spoke to you on that particular evening. Is that correct?

A I didn't hear the question.

Q Mr. Taylor spoke to you that evening, did he not? You called him, didn't you?

A I attempted to call him.

Q You never reached him?

A No, I didn't reach him that night.

Q I see. Did you reach him the following morning?

A Yes, I did.

Q Did Mr. Taylor tell you that Mr. Herring was working for him?

MR. GIACOBBE: Judge, objection. That is hearsay, pure hearsay.

[123] THE COURT: I will take it.

A Doing—

BY MR. ADAMS:

Q Yes or no.

A Yes.

Q Did he tell you he was working for him?

A Yes.

Q And did he tell you that he was working for him at or about 6 p.m. on September 15, 1971?

MR. GIACOBBE: Judge, now, Judge, I object, that is the most fundamental form of hearsay. I have no chance to cross-examine the person that is allegedly making these statements. Pure hearsay, Judge.

MR. ADAMS: Judge, this is part of the investigation made by this particular witness.

MR. GIACOBBE: It is still hearsay, Judge.

THE COURT: Overruled.

MR. ADAMS: Yes, sir.

THE COURT: You may answer.

A Ask the question again.

THE COURT: Would you read the question back?

(Thereupon, the Reporter read the last question.)

A Yes, he did.

[124] MR. ADAMS: One second, please.

THE COURT: Did he tell you what Mr. Herring's hours were to September 15th?

THE WITNESS: He didn't tell me what his hours were, your Honor.

THE COURT: That he was working at or about 6 o'clock on September 15th?

THE WITNESS: Yes, sir.

THE COURT: And this call was made the day after, that would be the 16th of September?

THE WITNESS: Yes.

THE COURT: Proceed.

BY MR. ADAMS:

Q Was it a call, or was it a personal conversation that you had with Mr. Taylor?

A Yes, it was.

Q A personal conversation?
A Yes.
THE COURT: You talked to him personally?
THE WITNESS: Yes.

BY MR. ADAMS:

Q And that was in the courtroom on Targee Street. Is that correct?
A It was not in the courtroom.
[125] Q In the vicinity of the courtroom, shall we say?
A Yes.
THE COURT: Does Mr. Taylor have a first name, as far as you know?
THE WITNESS: I did know it at the time, but I'm not familiar with it right now, your Honor.

BY MR. ADAMS:

Q Does Mr. Donald Taylor refresh your recollection?
A It could—yes, it refreshes it, somewhat. Somewhat, it is familiar.
Q Did you look in the wallet of Mr. Herring when you arrested him?
A Yes, I did.
Q Was there any money in there?
A No, there wasn't.
Q Nothing at all?
A No money.
Q Any silver on him?
A He may have had something. I don't recollect right now.
Q So to get this thing straight in my mind, if I may, Mr. Stubbs, you tried to reach Mr. Taylor on the 15th of September, and you couldn't get him?
[126] A Yes.
Q Then Mr. Herring was arrested and booked at the stationhouse. Right?
A Yes.
Q And then the following morning he was in the criminal court. Is that correct?

A That's correct.
Q Did you see Mr. Taylor after his arraignment—after Herring's arraignment in the criminal court?
A That's correct.
MR. ADAMS: Judge, may I have a moment, please?
THE COURT: You may.

(Mr. Adams peruses transcript.)

BY MR. ADAMS:

Q Mr. Stubbs, when you approached Mr. Herring on Broadway—was it Broadway?
A Yes.
Q —did you then, at that particular moment, tell him that he had been accused of committing a crime?
A Yes.
Q Did you tell him who accused him?
A Yes, I did.
Q Did he tell you at that time that it couldn't [127] be me, I haven't been in the area all that day?
A No, he didn't say those words.
Q What exactly did he say? If you recall.
A I recall him saying that he didn't do it, he couldn't have done it.
Q Mr. Stubbs, may I read, with the approval of the Court, page 12, line 5, a question and answer given to you by Mr. Braisted in November, 1971, and see if you recall this, sir? Question: What happened when you located him? Referring to Mr. Hering. Answer: Approached him and told him we had a problem in project. Someone had stated you had attempted to rob him. So he goes, no, it couldn't have been me because I haven't been here all day. Do you recall that, sir?
A If I said it—
Q Is that approximately correct?
A Approximately correct.
MR. ADAMS: One moment, please, Judge.

(Mr. Adams confers with defendant.)

MR. ADAMS: Excuse me, sir.

(Mr. Adams confers with Mr. Giacobbe.)

BY MR. ADAMS:

Q Mr. Stubbs, I believe in response to Mr. [128] Giacobbe's question, and correct me if I am wrong, you stated that at that particular time, on or about September 15th, you were investigating the area there for possible narcotics violations. Is that correct?

A That's correct.

Q Do you know whether Braxton was an addict, or took any kind of narcotics?

A No, I don't.

Q You don't know.

A I don't know.

Q When was the first time, may I ask you, that you saw Braxton on September 15th? May I say this? I believe you said that you were in the Braxton house a little bit after 5 o'clock. Is that correct?

A Yes.

Q Did you see him in that house at all?

A I can't recall, because I spoke only with the mother.

Q Do you recall whether he came in or out before you left?

A No, he didn't come in or out.

Q He didn't come in the house?

A While I was there.

Q While you were there. So the next time you saw [129] him is when he came looking for you up the street, after leaving the Braxton home. Is that correct?

A That's correct.

Q And that I assume would be shortly after 6 o'clock?

A Thats' correct.

Q And that was the first time that day you had seen him?

A I can't recall. I really can't.

Q But anyway, you did not see him on or about 5 or 5:15?

A I can't recall if I had seen him—no, I can't recall if I had seen him.

Q Now, did you ask Herring what he did with this particular item?

A I did not.

Q You never did?

A No.

Q Do you recall this question and this answer allegedly given by you to the grand jury? Page 13, line 14. Question: What did he say about it? Answer: He said he cleaned his fingernails with it. Does that refresh your recollection?

A I may have said that at the time.

[130] Q Well, if you said it at the time, was that the truth?

A It was the truth.

Q Officer, do you know whether Braxton was ever convicted of a crime?

MR. GIACOBBE: Objection, your Honor.

THE COURT: Sustained.

BY MR. ADAMS:

Q Officer, do you know whether Braxton ever made any other complaints similar to this one against a fellow by the name of Ralph Mason?

MR. GIACOBBE: Objection, your Honor.

THE COURT: Sustained.

BY MR. ADAMS:

Q Do you know a Ralph Mason, officer?

A No, I do not.

MR. ADAMS: All right, Judge.

MR. GIACOBBE: Thank you, sir. I have no further questions. People rest. If your Honor please, the testimony of this witness completes the People's case. People rest.

(People rest at 3:02 p.m.)

THE COURT: Do you have any motions?

[131] MOTIONS IN BEHALF OF DEFENDANT AT END OF PEOPLE'S CASE

MR. ADAMS: Judge, at this time I move to dismiss the indictment of this particular matter against the defendant, on the grounds that as a matter of law the

People have failed to prove the guilt of the defendant beyond a reasonable doubt.

Do you want to hear me extensively on that, Judge? Or I have a witness here, I can go on, or would you rather hear me on some lengthy argument subsequently, Judge?

THE COURT: I will hear anything you have to say.

MR. ADAMS: All right. Judge, I believe here that as a matter of law we have a doubt here. Firstly, on this first witness of the prosecution here, Judge. There were numerous inconsistencies, and I will not bore the Court reading that. Of course the Court has copious notes on it, and I am sure it is very fresh in the Court's mind. But on top of that, Judge, we have a questionable complainant, with a questionable way of how it happened, no witness other than this complainant.

An officer who checked out this particular matter testified here and said that the man was [132] working at that time. A definite denial by the defendant. And I believe that as a matter of law, Judge, there is a reasonable doubt here.

THE COURT: As to the first two counts, the motion is denied. The motion is granted as to the third count. The Court is of the opinion that People's exhibit one is not a dangerous instrument within the purview of the statute.

MR. ADAMS: So at this time, Judge, do I gather that count three was dismissed?

THE COURT: Exactly.

MR. ADAMS: Right, sir.

THE COURT: Now, one and two remain.

MR. GIACOBBE: Judge, if I may be heard on count three. The basis of the charge—start with the first count, the defendant is charged with attempted robbery. The allegation is that in connection with that robbery, he used a dangerous instrument.

Now, in connection with that count, he is charged in the third count with possession of the weapon that was allegedly used at the time of the robbery, not necessarily this instrument. So that if the Court were to find

the defendant might have [133] used a knife, but that this was not the knife, that is the contention here.

THE COURT: That is the possibility. But on the third count all I have is People's exhibit one, and I don't think that is a dangerous instrument as contemplated by the statute.

MR. GIACOBBE: Judge, we are talking now only on the question of a prima facie case, we are not talking reasonable doubt yet.

THE COURT: I understand.

MR. GIACOBBE: And we do have the evidence that has been testified to by the complaining witness that the defendant at the time of the robbery displayed a blade which the defendant allegedly swung at him. And that is the weapon that we are referring to in count three.

THE COURT: In other words, the People are conceding that the weapon used at the time of the alleged robbery was the same one that is in evidence as People's exhibit one and no other?

MR. GIACOBBE: I am saying that whether or not People's exhibit one is the weapon—whether this exhibit is the weapon that was used by the defendant in count three and one, that is a question [134] of fact for the Court to decide.

THE COURT: Yes.

MR. GIACOBBE: But again, that is a separate issue, I would submit, from the issue of whether or not he had a weapon at the time of the robbery.

THE COURT: I haven't dismissed the first count.

MR. GIACOBBE: I know that.

THE COURT: I haven't dismissed the second count. I only dismissed the third count.

MR. GIACOBBE: Assume for the sake of argument on this motion that the complainant's testimony was true, in that case I would submit that we made out a prima facie case on the first count. And if we have on the first count, then we must also on the third count, because the third count—

THE COURT: Assuming it is the same instrument.

MR. GIACOBBE: Let us assume for the sake of argument that nothing was recovered from the person of the defendant. The weapon in the third count that we—

THE COURT: I see, you are reversing it, you want me to make a judgment at least of this stage of the prima facie, that it might have been another [135] weapon.

MR. GIACOBBE: That is correct, yes.

THE COURT: And that it was that position at that time.

MR. GIACOBBE: Yes.

THE COURT: That is too far fetched. The third count is dismissed. We will take a short recess. I will take some of the other matters here. Remand.

(At 3:07 p.m. defendant is remanded and trial is recessed.)

AFTER RECESS

(At 3:46 p.m. defendant assumes seat at counsel table.)

MR. ADAMS: One moment please, sir.

(Mr. Adams confers with defendant.)

THE CLERK: Indictment number 311/1971, People against Clifford Herring. People by Mr. Giacobbe, defendant by Mr. Seymoure Adams. Both sides ready to proceed?

MR. GIACOBBE: People ready, your Honor.

MR. ADAMS: Judge, may we put this matter over to Monday morning?

[136] THE COURT: Mark it for 10:30, Monday morning. I have a calendar. Defendant is remanded.

(At 3:48 p.m. defendant is remanded. Trial is adjourned to 10:30 a.m., Monday, the 7th day of February, 1972.)

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[137]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART I

Ind. No. 311/1971

Attempt. robbery 1st deg.

TRIAL

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, N.Y.
Monday, February 7, 1972
11:02 a.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
Appearing for the People

By: ANTHONY I. GIACOBBE, ESQ., ADA, of Counsel

SEYMOURE ADAMS, ESQ.
Appearing for Defendant

IRWIN GOLDSTEIN
Official Court Reporter

[138] THE CLERK: Case on trial, indictment 311/1971, People versus Clifford Herring, by Mr. Adams.

(Defendant is not present.)

MR. ADAMS: Judge, at this time I want to restate to the Court that I entered the chambers with the consent of the Court at the request of a Mr. Taylor, who was subpoenaed into court today. He tells me that it is difficult for him to stay in court due to the fact that he had an accident in his business over the week in which one of his trucks jacknifed, or turned over, one of his drivers was killed. And he would like to work out something with the Court as far as his testimony.

THE COURT: Mr. Taylor, we can take your testimony right now, except that the Department of Corrections has not delivered the prisoners. You know, we can't try the case without the defendant, who is apparently on his way. Now, would it be convenient for you to return at 3 o'clock this afternoon?

MR. TAYLOR: I would be pretty well tied up, sir, there are quite a few things to do.

THE COURT: Well, would 4 o'clock be better for you?

MR. TAYLOR: I wouldn't want to say yes if I [139] can't be here. I am saying, it is not that I don't want to be here. The idea is, I have problems with the insurance company, the fellow's death, I have to straighten something out with his brother.

THE COURT: Would tomorrow morning be convenient for you?

MR. TAYLOR: I can't say. I would like to put it off another week, I have so many problems to straighten out.

THE COURT: We are in the middle of a trial. What does anybody propose?

MR. GIACOBBE: Judge—

THE COURT: I understand he has given a written statement. Have you seen it?

MR. GIACOBBE: No, I haven't seen it.

THE COURT: Why don't you show it to him?

(Mr. Adams hands paper to Mr. Giacobbe.)

MR. GIACOBBE: Along the lines he mentioned to me the other day when I interviewed him personally, Judge.

THE COURT: Would you come up, gentlemen?

(Mr. Giacobbe and Mr. Adams confer with the Court off the record before the bench.)

THE COURT: Mr. Taylor, I am afraid I will have [140] to direct you to return at 2 o'clock. We will get you out of here as fast as we can, but your testimony is critical in this case. A man faces a charge for which he could receive a sentence of 15 years in jail. If you have anything that is essential to this case, we must hear it. I am sorry if it is inconvenient to you.

MR. TAYLOR: I gave to the lawyer—

THE COURT: It is different, it has to be taken.

MR. TAYLOR: I have to be here at two?

THE COURT: Be here at two.

MR. TAYLOR: Very good.

(At 11:25 a.m. case set aside, to be later recalled.)

(At 2:05 p.m. case duly recalled. Defendant assumes seat at counsel table.)

THE COURT: Case on trial, indictment 311/1971, People against Clifford Herring. Mr. Giacobbe for the People, Mr. Adams for the defendant. Are both sides ready to proceed?

MR. GIACOBBE: People ready.

MR. ADAMS: Defendant ready.

[141] THE COURT: Call your witness.

DONALD TAYLOR, called as a witness in behalf of the defendant, after first being duly sworn, testified as follows:

(The witness states he resides at 375 Mountainview Avenue, Staten Island, New York.)

(2:07 p.m.)

DIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Taylor, you were subpoenaed into court by my subpoena. Is that correct?

A Correct.

Q And that subpoena had the so ordered by Judge Barlow. Is that correct?

A That's correct.

Q And I did speak to you last week about coming into court. Is that correct?

A That's correct.

Q Did you tell me that you were busy and tied up, and it was impossible, you would rather not come to court? Is that correct?

A That's correct.

Q Now, I call your attention specifically to September 15, 1971. Now, what firm were you connected with at that time?

[142] A A and A Tank Cleaning.

Q Location?

A 116 Campbell Avenue, Staten Island.

Q On September 15, 1971, sometime in the evening thereof, did you go down to the 120 Precinct?

A Yes, I did.

Q On the following morning, September 16, 1971, did you go down to the criminal court on Targee Street?

A That's correct.

Q And both times was it in reference to Clifford Herring?

A That's correct.

Q Now, were you called to go down to the precinct?

A Yes, I was.

Q Do you know by whom?

A Clifford Herring.

Q Down at Targee Street you spoke to the police officer?

A Yes, I did.

Q The name of Stubbs. Is that correct?

A I couldn't tell you his name offhand, to be honest with you.

[143] Q And you arrived on September 16th in court subsequent to the arraignment of Clifford Herring. Is that correct?

A That's correct.

Q Now, on September 15, 1971 was defendant Herring on your premises at 116 Campbell Avenue around 6 p.m.?

A Yes, I had seen him on the premise.

Q Did he work for you on and off prior and subsequent to September 15, 1971?

A To my knowledge, I didn't go into the payroll book, so forth like that, before he had worked for me, yes.

Q And how about subsequently?

A I couldn't answer you truthfully.

Q Now, he has a pay slip from you showing week ending October 1, 1971. Does that refresh your recollection, that he did work for you after September 15th?

A At that particular time we were paying—a man would work a week, and then the following week he would get his check, like that Friday. So naturally he—every payroll was like one week behind. If a man was, say for argument sake, there was no work for him, the following week he would get that finalized check. He always had a check coming to him a week later.

[144] Q Now, to the best of your recollection, was the defendant Herring on your premises on September 15, 1971 at or about 6 p.m.?

A The time, I couldn't give you a precise time, by no means, because I was busy in the office, in and out of the office. He was on or about the premise about that time. To give you the exact time, what location he was, I couldn't give.

Q He was in and out?

A Yes.

Q When you say in and out, that is in the yard and in the office?

A As far as my knowledge, he was in between both areas.

CROSS-EXAMINATION

(2:11 p.m.)

BY MR. GIACOBBE:

Q Mr. Taylor, are you the president of the A and A Cleaning Company?

A Yes, sir.

Q And you mention that on September 15th, you mentioned a Campbell Avenue address. Is that correct?

A That's correct, that is the shop.

Q Campbell Avenue, sir, is that a street that [145] runs between Broadway and North Burgher Avenue on Staten Island?

A The exact streets—North Burgher. It's not Broadway, it's another street up further. Exactly what street it is, I don't know offhand.

Q Are you familiar with North Burgher Avenue in Staten Island?

A That should be the street right down the block from the shop.

Q Are you familiar in the direction in which North Burgher Avenue runs?

A It travels this way, east.

Q It runs up from Henderson Avenue up Castleton Avenue, is that correct, and then above Castleton and below Henderson?

A It runs the opposite way, between Broadway and whatever the following street is on this side.

Q North Burgher Avenue, generally speaking, could you say it runs north and south?

A I couldn't tell you.

Q Does North Burgher Avenue run the same way that Broadway runs?

A Castleton Avenue runs the same as Broadway.

Q Castleton Avenue and Broadway—

[146] A Run this way, same exact way.

Q Castleton Avenue and Broadway run perpendicular to each other, do they not, they cross?

A No. They are behind each other. In other words, my shop is actually on Castleton Avenue and Broadway is the following street next to it.

Q Do you live on Staten Island?

A Yes, I do. I am not very familiar with the homes.

Q Are you familiar with the location of PS 18 on Staten Island?

A That should be the school right up the hill.

Q PS 18 is in West Brighton, is it not?

A That's right.

Q And PS 18, there is a new building to it, an old building, is there not?

A That's right.

Q And the new building is now on the corner of Henderson Avenue and—

A Broadway.

Q —Broadway. Is that right?

A Correct.

Q And the older portion of PS 18 is also partly on Broadway. Is that correct?

A Broadway, correct.

[147] Q That is up closer to Castleton. Is that right?

A That's correct.

Q Now, at that point, Broadway and Castleton cross each other, don't they?

A Broadway and Castleton do, yes.

Q So that they are perpendicular to each other. Is that correct?

A I'm sorry, that's right.

Q Campbell Avenue, does that run the same way as Castleton?

A No, it runs the same as Broadway.

Q Where does Campbell Avenue start and where does it finish, as far as you know?

A The exact streets I couldn't tell you, to be honest with you.

Q Does Campbell Avenue start approximately by the old PS 18 schoolhouse building?

A Directly up behind the old schoolhouse.

Q And Campbell Avenue goes down towards Henderson Avenue?

A Right, down, towards the projects.

Q In other words, Campbell Avenue starts around the old PS 18, crosses Henderson, goes down below [148] Henderson to the projects. Is that correct?

A Right, two blocks.

Q And when you talk about the projects, do you mean the Markham Home project?

A That's correct.

Q Campbell Avenue, it starts by PS 18 and goes down to the projects; do you know if Wayne Street is the street that Campbell Avenue comes into? In other words, it makes a dead end on Wayne Street?

A To be honest with you, I couldn't tell you. I am not very good with the streets, and the names of the streets.

Q The garage that you were working out of on September 15, 1971, was that located on Campbell Avenue below Henderson Avenue or above Henderson?

A It's below.

Q So that it is located near the area where the projects begin. Is that correct?

A That's right, half a block away.

Q Now, Campbell Avenue does go in—it ends at a street that runs perpendicular to it by the projects?

A That's right.

[149] Q Assume now that that street is Wayne Street, how far from Wayne Street and Campbell Avenue, how far up was the garage located that you were working out of?

A A half a block.

Q Now, do you know where Markham Court is?

A No, I don't.

Q Do you know where Markham Road is?

A To be honest with you, I don't. I am only here six months, to clarify myself, I am only here six months. Which one is the other is Greek to me. If it was in Brooklyn, I could tell you.

Q You don't know the streets in the Markham Homes?

A No, I don't.

Q In any event, the garage you were working out of is half a block up from the end of Campbell Avenue?

A That's right.

Q Which is where the projects began. Is that correct?

A Right.

Q Now, what type of work was being carried on at the garage that you were at on September 15, 1971? [150] A At that particular time, at night, normally the trucks were on there way in, whichever were out, and you are parking vehicles, and entering the sludged product off the trucks into trailers in the yard, taken to the dumps.

Q What kind of building is located at the Campbell address you gave us?

A Type? What do you mean?

Q A garage, or an office?

A It's a garage. There was a small office there that we were working out of at that time.

Q So is it correct to say the building you were working out of is a large garage and inside the garage is a small office?

A Right, a little office to the righthand side.

Q Now, were you working in that office?

A Yes, I was.

Q And was that office you were working in separated by glass or any partitions from the rest of the garage?

A There's a window right there, you can look out through the window to the garage.

Q About how large a window in the office?

A Thirty-six inches by four foot in height.

[151] Q What type of work was this defendant employed to do for you?

A He was a helper on a truck.

Q A helper on a truck?

A Yes.

Q On September 15th, what were his regular hours of work?

A Normally between eight and five, unless there is an emergency, and then they work overtime.

Q Was there an emergency there that day, do you recall?

A No, we just happened to be in the shop, doing a little of this, a little of that, back and forth.

Q Were you in the office all day, or did you arrive there at a certain time?

A I was there a good part of the day, I would say.

Q So that do you recall being there let's say at 5 o'clock?

A I was there from 5 o'clock on, to closing.

Q You were there from 5 o'clock on?

A That's correct.

Q What type of work were you doing in the office once you arrived there at 5 o'clock?

A Normally it's on the 'phone, speaking on the 'phone.

[152] Q Now, when you say you are on the 'phone, are you continuously on the 'phone?

A Talking to different customers, oil companies. We work with oil companies, Paragon, so forth.

Q Were you the only person working in the office?

A Myself, and there's another gentleman there who does typing, whatnot. Normally he went home 6 o'clock at night, normally.

Q Once you got into the office around 5 o'clock, did you have any occasion to go outside of that office, that you were working in?

A Occasions, off and on, I was in and out.

Q Can you remember at this point exactly when you left, how long you were out of it, and so forth?

A The exact time, I couldn't give, because you are on the 'phones, out of the office, in the office, you know, you are back and forth.

Q When you say you are on the 'phone, is it safe to say, to assume that you are continuously on the 'phones once you get into that office?

A Yes—well, it's hard to answer that, too, properly, because it's yes and no, your Honor. You're on the 'phone, and something will be going on in the garage and you walk out to see what's going on, and then [153] back on the 'phone.

Q You recall this past Friday, when I came to your office with the detective?

A On that day I was married to the telephone.

Q And you were on the telephone when I spoke to you?

A That's right.

Q As a matter of fact, you had two telephones going at one time?

A That's correct.

Q Did you have one or two telephones going at the Campbell office?

A Yes, we had two 'phones going.

Q You had two 'phones. And at times would you be on two 'phones at once, as you were this past Friday?

A Yes, there's occasions.

Q So that you are very busy with your 'phone work in your work in the office. Is that correct?

A That's correct.

Q Now, how many employees did you have working for you at this Campbell Avenue address on the afternoon of September 15, 1971?

A Again, I didn't check—well, I'd say approximately, [154] there was four fellows on that particular day working for us.

Q How many?

A Four.

Q At around five or six or seven p.m. approximately how many people did you have working in the garage?

A There was at least two or three fellows outside. This is why I say it's hard to—

Q Are some working in the garage and some working outside the garage?

A That's correct.

Q As a matter of fact, outside the garage there is a yard. Is there not?

A Yes.

Q Do you store equipment in that yard?

A Yes.

Q Was equipment being parked and stored at the yard on September 15, 1971 in the yard?

A At the time—I believe they were working in the yard.

Q So that whoever was there at the place might have been inside the garage, and might have been outside the garage. Is that correct?

[155] A That's right.

Q And is this correct say 5 o'clock, or 6 o'clock or 7 o'clock as well?

A More or less, because they are in and out. It's a type of thing where they are in the shop and then out in the yard itself, working or unloading a truck, whatever.

Q So that the people you have working there in that garage on the late afternoon or early evening of September 15, 1971, while you are on the 'phone, you don't have them all under your constant observation all the time now, do you?

A Of course not.

Q Are there lengthy periods of time during the course of which you might not have all of them under your observation?

MR. ADAMS: Judge, may I object to "lengthy periods of time" in that question, Judge?

THE COURT: I will sustain the objection, as to form.

BY MR. GIACOBBE:

Q Are there periods of time when some of them are not—when you don't see them, in other words?

A Of course. If there wasn't, I wouldn't need them [156] there.

Q When you are on the telephone talking to customers and other people, you are not watching the people in the shop. Is that correct?

A Not all the times.

MR. ADAMS: Objection, Judge.

THE COURT: Objection sustained.

BY MR. GIACOBBE:

Q So that can you recall specifically what time this defendant, Herring, arrived there and what time he stayed and what time he left?

A Specifically, I couldn't be honest with you. I'd say in the areas of 5:30. 6 o'clock, I had seen Cliff there.

Q And when you say between 5:30 and 6 o'clock, you had seen him, based on what you told us so far,

is it safe to say that during some of that period of time he might have been out of the garage and he might have been in the garage?

A It's possible, he could have walked out into the yard to speak to somebody else.

Q And if he did leave the garage, you wouldn't know for how long a period of time he was gone. Is that correct?

[157] A Not really. I never followed him around, you know, but I know he was on the premise, also he was there later on, also.

Q Now, on the night of September 15, 1971, when was it when you learned that the defendant Herring had been arrested?

A I believe around 10 o'clock, 10:30. He called me at home.

Q That was the first time you learned about it?

A That was the first time I learned about it, yes, sir.

Q Do you recall specifically and definitely what time it was when he left your place of business that night?

A That particular night I do, because we were sitting outside talking, and—it was about 9:30, 10 o'clock—no, it couldn't have been. About 9 o'clock, 9:30 I would say, because I just went home and I got the call maybe an hour later when he was arrested.

MR. GIACOBBE: Thank you very much. No further questions.

MR. ADAMS: Just one second, please.

THE WITNESS: Sure.

(Mr. Adams confers with defendant.)

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[158] (2:23 p.m.)

REDIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Taylor, do you remember whether that was the night that you and Clifford Herring had picked up

a refrigerator and were working in your place on the refrigerator that night?

A I don't remember offhand. It's not fair to be able to answer one way or the other, to be honest with you.

Q What is that?

A I don't remember offhand, that particular night, you know.

THE COURT: Did Mr. Herring get paid that night?

THE WITNESS: No.

MR. ADAMS: I am sorry,, Judge, I didn't hear that.

THE COURT: I asked him if Mr. Herring got paid that night, his answer is no.

MR. ADAMS: All right, Judge.

(2:24 p.m.)

RECROSS-EXAMINATION

BY MR. GIACOBBE:

Q Do you recall what day of the week this was?

A Offhand I couldn't tell you.

Q What day of the week was pay day?

A Fridays.

[159] Q Every Friday?

A Every Friday.

MR. GIACOBBE: Thank you.

THE COURT: You may step down.

(Witness Taylor excused.)

MR. ADAMS: May I continue, Judge?

THE COURT: Yes.

CLIFFORD HERRING, defendant herein, called as a witness in and for his own behalf, after first being duly sworn, testified as follows:

(The witness states he resides at 125 Cassiday Place, Staten Island, New York.)

(2:25 p.m.)

DIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Herring, can I take you back now to September 15, 1971? Do you recall that date?

A Yes, I do.

Q Would you speak loud, please?

A Yes, I do.

Q Now, did something happen to you, were you apprehended on September 15, 1971?

A Yes, I was.

Q About what time?

A Somewhere about 7:30, 8 o'clock, somewhere around [160] there.

Q Where were you apprehended?

A At the corner of Broadway and Market Street.

Q I see. Were you apprehended by Officer Stubbs?

A Yes, I was.

Q And you heard Officer Stubbs testify. Is that correct?

A Yes, I did.

Q Now, on September 15, 1971 were you over at this 116 Campbell Avenue?

A Yes, I was.

Q With Mr. Donald Taylor who preceded you as a witness. Is that correct?

A Yes, I was.

Q Now, when you were approached by Officer Stubbs on September 15, 1971, did you tell him that you were working that night?

A Yes, I did.

Q And were you then taken to the 120 precinct?

A At the time of my arrest?

Q Yes.

A No, I was taken into the project across the street.

Q And then were you taken to the 120 precinct?

A Yes, I was.

[161] Q Did Mr. Taylor come down that evening pursuant to a telephone call?

A Yes, he did.
Q Did you see him there that evening?
A I didn't see him there, but I understand he was there.
Q Did you see him in court the following day, on September 16, 1971?
A Yes, I did.
Q Now, will you tell this Court what you were doing on September 15, 1971 at 6 p.m. and prior thereto?
A Before six?
Q Yes.
A We were working on a refrigerator that we went up and picked up.
Q Please, a little louder, Mr. Herring.
A We were working on a refrigerator, and cleaning up the shop.
Q Where had you picked up the refrigerator?
A From the corner candy store of Castleton Avenue and Broadway.
Q Who was with you?
A Donald Taylor.
[162] Q That was the witness that preceded you on the stand?
A Yes, and one of the other workers.
Q Where did you go from there?
A Back to the shop.
Q And approximately what time did you get there?
A To the shop?
Q Yes, if you know.
A It was about 3:30.
Q Now, at 6 p.m. on September 15, 1971 were you in the shop?
A Yes, I was.
Q Were you there 5:30?
A Yes, I was.
Q Were you there at 6:30?
A Yes, I was.
Q And were you there at 6 p.m.?
A Yes, I was.
Q Now, did you hear Mr. Braxton relate that you pointed a blade, or a knife at him, he didn't know which

one, but did you hear him say that you approached him and asked him for some money on September 15, 1971, around 6 p.m.? Is that correct?
A Yes, I did.
[163] Q Did you?
A Yes, I heard him.
Q Did you approach him that night?
A No, I didn't see him.
Q When was the first time you saw him on September 15th?
A When Officer Stubbs had apprehended me and took me in the projects, where he had a knife, in the projects.
Q Now, do you know the witness Braxton that testified here?
A Yes.
Q Do you know his father?
A Yes.
Q Have you ever lived near him?
A Have I ever lived near him?
Q Yes.
A Yes.
Q Where?
A Nine Markham Drive.
Q How long did you live at 9 Markham Drive?
A I stayed with my family there for a few months. They continued to live there for quite a while, over a period of years.
Q Did you know Braxton for a number of years [164] before September 15, 1971?
A I knew him as a small boy.
Q I see. Now, did Braxton ever ask you for any money at any time prior to September 15, 1971?
A Occasionally.
Q When I say prior, I am talking about before September 15, 1971.
A Occasionally.
Q What did he ask you money for?
A Different things, get wine, sometime he wanted drugs.
Q And what did you tell him?

A I told him I'm working, why couldn't he go to work, and get his, too.
Q Were there ever any words between you and Braxton?
A Except that any time he was refused, you know, I was called a name, something of that sort, I'll fix you, you know.
Q What is that?
A I would be called a name, or he'd say, I'll fix you, something like that.
Q He would say that to you?
A Yes.

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[165] CROSS-EXAMINATION

(2:30 p.m.)

BY MR. GIACOBBE:

Q This Campbell Avenue garage where you worked, was the street at the end of Campbell Avenue, was that Wayne Street?
A That is.
Q And you know where Markham Drive is. Right?
A Yes, I do.
Q How far is Markham Drive from Wayne Street?
A I guess about three city blocks.
Q It's in the project. Is that correct?
A That's correct.
Q And you have walked from Wayne Street and Campbell Avenue to Markham Drive, haven't you?
A Have I walked from Campbell Avenue to Wayne Street?
Q Yes, to where Braxton lives.
A To where Braxton lives?
Q Right.
A I've walked past there.
Q How long does it take you to walk from Campbell Avenue and Wayne Street to where Braxton lives, if you are walking?
A That depends on the pace you are walking.
Q Suppose it was a medium pace.

A Maybe a little over ten minutes.
[166] Q Suppose it was a fast pace?
A That depends on how fast.
Q I see. But less than ten minutes, I guess, is it fair to say?
A Probably.
Q Now, how long did you know Braxton before September 15, 1971?
A I can't count the years. I was in Korea with his father, so I know him as a boy.
Q On September 15, 1971 you knew that Allen Braxton previously had been on drugs at one time or another. Right? Did you know that?
A Prior to that?
Q Yes.
A Yes, I did.
Q As a matter of fact, you yourself had used heroin before that. Is that correct?
A At one time.
Q Were you using heroin on September 15, 1971?
A No, I was not.
Q How much a week did you take home from this job that you had in September of 1971, what was your weekly take-home pay?
A That depended on how many days you worked, or how [167] many hours I put in.
Q The Friday before September 15, 1971, the payday before, what was your take-home pay? Do you remember?
A I couldn't tell you.
Q Now, on September 15, 1971 did you see Allen Braxton at anytime before 6 o'clock?
A What was that now?
Q On September 15, 1971 did you see Allen Braxton any time before 6 o'clock?
A No, I did not.
Q Isn't it a fact in the late afternoon of September 15, 1971, at approximately 5 o'clock, you tried to rob money from Allen Braxton in the Broadway area of Staten Island?
A No, it's not.

MR. ADAMS: Judge, I object. Sorry, there was no statement about that by Allen Braxton. The crime is 6 o'clock, Judge.

MR. GIACOBBE: This is a different incident I am questioning about, Judge.

THE COURT: Overruled.

BY MR. GIACOBBE:

Q What was your answer to that?

[168] A I said no.

Q You didn't approach him about 5 o'clock and ask him for money?

A I didn't seen Allen Braxton.

Q Now, what time was it when you say the housing authority policeman arrested you? You say it was 7:30 to 8 o'clock?

A I'd say approximately, around that time.

Q Did you hear your employer before testify that you didn't leave work that night until 9 o'clock?

A It could have been 9 o'clock.

Q Well, what do you mean it could have been? Were you arrested at 7:30, 8 o'clock or later?

A It was dark, it was late, and I don't remember the exact time.

Q How far from work were you when you were arrested?

A How far?

Q Yes.

A I was at Broadway and Market Street, which you spoke of, that you know the area, so you know just about how far I was away.

Q You tell us, how many blocks from your place of work were you when you were arrested?

[169] A How many blocks away from work?

Q Yes, that is the question.

A I'd say four city blocks away.

Q Well, when you were arrested, had you already left work for the night, or were you just away for a little while, planning to go back to work?

A I was away for the night. The boss had left, locked up and took me and dropped me off.

Q Now, Mr. Herring, on November 13, 1971 did you steal $20 from—

MR. ADAMS: Objected to, Judge, objected to.

THE COURT: Overruled.

BY MR. GIACOBBE:

Q Did you steal $20 from Willy Smith on Henderson Avenue, Richmond County, by force?

MR. ADAMS: Objected to, Judge.

A No, I did not.

MR. ADAMS: Judge, this is not proper examination.

THE COURT: I think it is.

MR. ADAMS: Judge, may I remind the Court that you did not permit me to ask the same questions of Allen Braxton?

THE COURT: This is a little different. It [170] wasn't the same question.

MR. ADAMS: Exception, please.

THE COURT: Your question was whether he was arrested.

MR. ADAMS: All right, Judge.

THE COURT: You may proceed.

MR. ADAMS: May I have an exception to all this?

THE COURT: Noted.

BY MR. GIACOBBE:

Q On September 10, 1970, Mr. Herring, were you convicted in this court of the crime of petit larceny?

A When was this now?

Q September 10, 1970, were you convicted of the crime of petit larceny?

MR. ADAMS: Judge, I will consent, Judge, that this—

MR. GIACOBBE: Judge—

MR. ADAMS: One second, please, Mr. Giacobbe. I can make a statement and then you can object to it.

MR. GIACOBBE: Thank you.

MR. ADAMS: You are welcome, sir. Judge, I will consent to the fact that Mr. Herring has a record of probably two misdemeanors.

[171] MR. GIACOBBE: Judge, I am not testing his credibility.

THE COURT: All right, Mr. Giacobbe.

MR. ADAMS: Exception—objected to, Judge.

THE COURT: Overruled.

BY MR. GIACOBBE:

Q What was your answer?

A My answer was, was I convicted by force, yes.

Q That is in connection with theft of $10 by Linda Thompson?

A Was I convicted? Self convicted.

Q You pleaded guilty?

A Yes.

Q And also on September 10, 1970 were you convicted of a separate crime of petit larceny in connection with the theft of $25 from a Robert Horvath?

A Under the same conditions, yes.

Q You pleaded guilty to that?

A Under the same conditions, yes.

Q And then on or about March 20, 1970 were you convicted of the possession of a hypodermic instrument; that is, conviction at the hands of a jury, were you?

[172] A Yes.

MR. GIACOBBE: I have no further questions. I am sorry, Judge, one more question.

BY MR. GIACOBBE:

Q On November 20, 1964 were you convicted of the crime of unlawful entry in the criminal court, Richmond County?

A When was this?

Q November 20, 1964.

A I don't remember.

MR. GIACOBBE: Thank you. No further questions.

(2:38 p.m.)

REDIRECT EXAMINATION

BY MR. ADAMS:

Q Mr. Herring, I heard, in cross-examination, you mention the word "Korea." Were you in Korea?

A Yes, I was.

Q What were you doing there?

A I was in the army.

MR. GIACOBBE: Judge, objection, unless he was in Korea on September 15, 1971, I submit that is totally irrelevant.

THE COURT: I will take it. You may answer the question.

A Yes, I was, I was in the United States Army.

[173] Q How long were you in the army?

A I was in the army from about '51 to '55. '51 to '55.

Q Were you given an honorable discharge?

A Yes, I was.

MR. ADAMS: Nothing further, your Honor.

THE COURT: You may step down.

(At 2:39 p.m. defendant-witness is excused.)

THE COURT: Is that the defendant's case?

MR. ADAMS: One moment, please, Judge.

(Mr. Adams confers with defendant.)

MR. ADAMS: Defendant rests, Judge.

MR. GIACOBBE: People rest, your Honor.

THE COURT: Before hearing the motions, the Court will reverse a ruling made earlier in the trial in which it overruled an objection of the People to testimony of the witness Stubbs, which called for a hearsay answer, and sustain the objection on the grounds it was hearsay. I will hear your motions.

MR. ADAMS: Can I be heard on that, Judge?

THE COURT: You certainly may.

MR. ADAMS: On that particular reversal of the

[174] Court's ruling.

THE COURT: You may.

MR. ADAMS: Judge, Officer Stubbs testified about what this particular individual, who is here today, tes-

tified, Judge. He came and approached the defendant and testified, and said to him, "Clifford, there is some trouble, you have been accused of something." And he takes him some place, and allegedly he testifies that Clifford Herring says to him, "I was some place." So he calls up and checks on that. And I believe, Judge, it's not hearsay, it is part of the investigation, it is part of res gestae, and it is part of the officer's duty, and I submit to the Court that reversal of the Court's ruling, I respectfully submit, is wrong.

THE COURT: Your objection is noted.

MR. ADAMS: Exception, please.

THE COURT: Exception is noted. I will hear your motions. This is not in summation, I will not permit summation, but I will hear your motions.

MR. ADAMS: I didn't hear the last part, Judge.

THE COURT: I said I will not permit summation, but I will hear your motions.

[175] MOTIONS IN BEHALF OF DEFENDANT AT END OF DEFENDANT'S CASE

(2:41 p.m.)

MR. ADAMS: Judge, at this time I respectfully move to—make two motions, Judge. Firstly, that the Court dismiss the two counts, first count and the second count of the indictment on the grounds the People have failed to make out a prima facie case; and on the further grounds the People have failed to prove the defendant guilty of each and every part and parcel of the crimes charged in count one and count two beyond a reasonable doubt as a matter of law, and as a matter of fact.

THE COURT: Motion denied. I will take a short recess to deliberate, and I will give you a verdict.

MR. ADAMS: Well, can I be heard somewhat on the facts?

THE COURT: Under the new statute, summation is discretionary, and I choose not to hear summations.

THE CLERK: Remand.

(At 2:42 defendant is remanded; trial is recessed pending Court's determination after [176] deliberation.)

(At 2:50 p.m. defendant is present at counsel table with Mr. Adams.)

THE CLERK: Case on trial, indictment 311/1971, People against Clifford Herring; People by Mr. Giacobbe, defendant by Mr. Adams. Defendant is present with counsel. Are both sides ready to proceed?

MR. GIACOBBE: People are ready, your Honor.

MR. ADAMS: Ready, sir.

THE COURT: I am prepared to render a verdict.

THE CLERK: Will the defendant please stand.

(Defendant complies with request.)

VERDICT

THE COURT: The verdict of the Court on count one is, the Court finds the defendant not guilty.

On Count two, which charges the defendant with attempted robbery in the third degree, the verdict of the Court is guilty.

The third count was dismissed.

I will hear your motions.

MR. ADAMS: Yes, Judge. At this time, Judge, I respectfully except to the findings of the Court on the second count of the indictment, and respectfully have an [177] exception thereto.

THE COURT: All right. Do you have any other motions?

MR. ADAMS: Just to set aside the verdict as against the weight of the evidence, usual motions, statutory, Judge. And I have to assume the Court will deny them.

THE COURT: Motion denied.

MR. ADAMS: With an exception, please.

THE COURT: Right. Defendant is remanded. Do you waive fixation of specific date for sentence?

MR. ADAMS: Yes, Judge.

THE CLERK: Remand.

(Defendant is remanded.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

IRWIN GOLDSTEIN
Official Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM

PART I

Ind. No. 311/1971
(12322)

Att. robbery 3rd deg.

SENTENCE

PEOPLE OF THE STATE OF NEW YORK,

—against—

CLIFFORD HERRING, DEFENDANT.

County Courthouse
Staten Island, N.Y.
Thursday, June 15, 1972
10:09 a.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., ESQ., District Attorney
Appearing for the People

By: PHILLIP G. MINARDO, ESQ., ADA, of Counsel

SEYMOURE ADAMS, ESQ.
Appearing for the Defendant

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[179] THE CLERK: Indictment number 311/1971, People versus Clifford Herring, by Seymoure Adams.

(Defendant and counsel stand before the bar.)

MR. ADAMS: Good morning, sir.
THE COURT: Good morning, Mr. Adams.
THE CLERK: Is the defendant ready for sentence?
MR. ADAMS: Yes, sir.
THE CLERK: The People have any recommendations as to sentence?
MR. MINARDO: Your Honor, this defendant was convicted at the trial. He is no stranger to the Court. He has a long extensive criminal record. We recommend the Court impose the maximum sentence under the conviction.
MR. ADAMS: Judge, may I be heard on that, please?
THE COURT: You may.
MR. ADAMS: Judge, in this particular matter, defendant was indicted. There were three counts of the indictment. May I remind the Court, although at this moment we are bound by the decision, where he was found guilty of one count, which is not the most serious count of the indictment, Judge. There are sharp issues of fact here, Judge, and I respectfully [180] request the Court be as lenient as possible under the circumstances.
THE COURT: Mr. Herring, do you wish to be heard in your own behalf?
THE DEFENDANT: I haven't anything to say.
THE COURT: Clifford Herring, it is the judgment of this Court that you be sentenced to the New York State Department of Correction for indeterminate term not to exceed four years. This sentence is to run concurrent with any sentence you receive under indictment number 1/1972.
MR. ADAMS: Judge, may I put on the record I have advised the defendant of his right to appeal, and he will file the notice of appeal himself? In fact, I have advised him that I think he should appeal. Thank you, sir.
THE COURT: All right.

(Defendant's rights to appeal form filed with the Court Clerk upon execution thereof, defendant retaining copy of same.)

THE CLERK: Remand.

(Defendant is remanded.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

[181] At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 24, 1973.

HON. JAMES D. HOPKINS,
Acting Presiding Justice

HON. FRED J. MUNDER
HON. M. HENRY MARTUSCELLO
HON. FRANK A. GULOTTA
HON. ARTHUR D. BRENNAN
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

CLIFFORD HERRING, APPELLANT

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION

In the above entitled action, the above named Clifford Herring, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Richmond County, rendered June 15, 1972; and the said appeal having been argued by Diana A. Steele, Esq., of counsel for the appellant, and argued by Norman C. Morse, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

[182] STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. HAROLD A. STEVENS, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

CLIFFORD HERRING

CERTIFICATE DENYING LEAVE

I, HAROLD A. STEVENS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
January 31, 1974

/s/ Harold A. Stevens
Associate Judge

* Description of Order:

[183] At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 22, 1974.

HON. FRANK A. GULOTTA
Presiding Justice

HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
HON. ARTHUR D. BRENNAN
HON. FRED J. MUNDER
Associate Justices

THE PEOPLE, ETC., RESPONDENT

v.

CLIFFORD HERRING, APPELLANT

ORDER

In the above entitled cause, the above named Clifford Herring, defendant, having appealed to this court from a judgment of The Supreme Court, Richmond County, rendered June 15, 1974; and this court, by order dated December 24, 1973, having unanimously affirmed the judgment; and the appellant having moved to amend the remittitur of December 24, 1973, so as to state therein that constitutional questions were presented, namely, whether he was deprived of his rights under the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States;

Now, upon the papers filed in support of the motion and there being no opposition thereto, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby granted to the following extent: decision and order of this court dated December 24, 1973 amended by adding thereto the following:

Upon the appeal herein, there was presented and passed upon the following constitutional question, namely, whether relator's rights under the Fourth, Sixth and Fourteenth Amendments were denied by the trial court's application of paragraph (c) of subdivision 3 of CPL 320.20 to refuse appellant permission to deliver a summation. This court considered appellant's said conviction and determined that none of his constitutional rights were violated.

Enter:

IRVING N. SELKIN
Clerk of Appellate Division

SUPREME COURT OF THE UNITED STATES

No. 73-6587

CLIFFORD HERRING, APPELLANT

v.

NEW YORK

APPEAL from the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

The statement of jurisdiction in this case having been considered by the Court, probable jurisdiction is noted.

October 21, 1974

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